Moving Beyond Animal Rights:
A Legal/Contractualist Critique

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“[H]e who is cruel to animals becomes hard also in his dealings with men.”¹

Since important legal victories against racial discrimination and other forms of discrimination in the 1950s and 1960s, many legal scholars and lawyers have been increasingly attracted to the “romance of rights.”² For these scholars and lawyers, analogies to the civil rights movement seem especially appealing as vehicles for achieving societal change in new fields. Animal Law is perhaps the fastest growing field of study in American legal education and scholarship, and calls for legal rights for some or all animals are rapidly expanding. This Article critiques comparisons between rights sought for animals and rights assigned to infant humans, mentally incapable adult humans, and corporations. It argues that legal and societal reforms regarding animals are better suited to social contract—contractualist—ideals than to creation of new rights. Contrary to the increasingly frequent assertions of some animal rights theorists, appropriate treatment of animals in a manner that benefits society’s overall interests is attainable through focusing on human responsibility for animal welfare under social contract principles. Developing an artificial construct of formal rights for animals would be harmful both to humans and, ultimately, to animals.

I. INTRODUCTION

In legal discourse, rights are not what they used to be. Their perceived scope is expanding.³ The rapidly broadening debate regarding animals’ legal status is illustrative.

The 2008 annual meeting of the American Association of Law Schools (AALS) dedicated two separate panel discussions to questions of potential rights and personhood related to animals.⁴ The AALS annual meeting also witnessed adoption of proposed bylaws and election of proposed officers by a group of law professors seeking to form a new

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¹. IMMANUEL KANT, LECTURES ON ETHICS 240 (Louis Infield trans., Harper Torchbooks 1963) (1780).
³. See, e.g., Leti Volpp, Righting Wrongs, 47 UCLA L. REV. 1815, 1815–16 (2000) (referencing some professors who feel that the traditional meaning of civil rights is insufficient to address modern problems and others who feel that redefining that term would jeopardize the entire social enterprise).
⁴. See Association of American Law Schools, Reassessing Our Roles as Scholars and Educators in Light of Change (Jan. 5, 2008), http://www.aals.org/am2008/saturday/index.html (presenting two discussion panels titled “The Margins of Legal Personhood” and “Debating Animals as Legal Persons and Gathering to Consider Formation as an AALS Section”).
AALS Section on Animal Law. Approximately 280 full-time law professors signed a petition seeking formation of the new section.\(^5\) In June 2008, the AALS granted provisional approval of the new section.\(^6\)

These developments join several other indicia that interest in animals’ legal status is growing explosively among legal academics and practitioners. As Cass Sunstein explained in 2004, “the animal rights question has moved from the periphery and toward the center of political and legal debate.”\(^7\) He also noted that the debate is “fully international”; for example, Germany became the first European nation to extend rights to animals in its constitution in 2002.\(^8\)

In the United States, “animal law” may be the most rapidly developing field of study in legal academia. As recently as the mid-1990s, only one or two United States law schools offered courses focusing on animal law.\(^9\) In just over a decade, the number of law schools that have offered or are planning to offer such courses has skyrocketed to at least ninety-four.\(^10\) This includes courses at most elite law schools.\(^11\) In the past two years, no fewer than three new scholarly journals focusing exclusively on animal law have been established—Stanford University Law School’s *Stanford Journal of Animal Law & Policy*\(^12\) in 2007, the University of

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5. E-mail from Joan Schaffner, Dir. of the Animal Law Program, George Washington Law Sch., to Animal Law Instructors, Member Law Schools of the Ass’n of Am. Law Sch. (Feb. 1, 2008) (on file with author). A petition was circulated to create a section on Animal Law at the Association of American Law Schools’ annual conference in January 2008. *Id.* Approximately two hundred eighty professors signed the petition, representing sixty-five member law schools. *Id.*

6. E-mail from Joan Schaffner, Dir. of the Animal Law Program, George Washington Law Sch., to Animal Law Instructors, Member Law Schools of the Ass’n of Am. Law Sch. (June 3, 2008) (on file with author).


Pennsylvania Law School’s *Journal of Animal Law and Ethics*¹³ in 2007, and Michigan State University College of Law’s *Journal of Animal Law* in 2006.¹⁴ These join a fourth journal, the *Animal Law Review*, which was established in 1995.¹⁵

In recent years, the American Bar Association and numerous state and local bar associations have inaugurated new sections dedicated to animal law.¹⁶ The Animal Legal Defense Fund, which was a relatively small organization only a decade ago, now has established chapters in at least 124 law schools, and claims to now have over 100,000 members.¹⁷ Growing interest in the field has also spread to Congress. For example, in April 2008, a bill was introduced in the United States House of Representatives that would “prohibit the conducting of invasive research on great apes . . . .”¹⁸

As reflected in the 2008 AALS panel sessions addressing animals’ status, the intensifying discussion of humane treatment brought about or reflected by this meteoric growth is frequently couched in the language of rights. News stories frequently describe advocates for humane treatment of animals as “animal rights activists.”¹⁹ The concept of “animal welfare activists” seems less familiar.²⁰

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¹⁶. *See* Cupp, supra note 9, at 4.


²⁰. Interestingly, however, some news accounts addressing animals’ interests have used this term. *See, e.g.*, Douglas Belkin, *Seal Hunters Fight Long Cruelty Label*, WALL St. J., Mar. 23, 2007, at B3 (stating animal welfare activists are infuriated by a coalition of Canadian sealers trying to revamp itself as environmentally friendly); *see also* Glenn Collins, *For ‘Animal Precinct,’ Reality Subject to Dispute*, N.Y. TIMES, July 23, 2007, at
To many activists, the notion that animals should be afforded basic rights against cruelty and mistreatment seems manifest. Of course, the argument is not that animals should enjoy all rights that most humans enjoy, such as the right to vote. Rather, many activists view more basic animal interests—such as an interest in being free from unnecessary infliction of suffering—as rights. Arguing for broad improvements in the treatment of animals often seems intertwined with arguing that animals should have basic rights against mistreatment.

The popularity of the phrase animal rights activists rather than something like animal welfare activists reflects an increasing focus on animals as potential bearers of rights rather than on humans as bearers of responsibility for the welfare of animals they control. This is consistent with the evolution of the animal welfare movement and the recognition of animals as sentient beings with interests and rights. As noted by Beth Ann Madeline, "Cruelty to Animals: Recognizing Violence Against Nonhuman Victims," 23 U. Haw. L. Rev. 307, 309–15 (2000), the shift in terminology from animal welfare to animal rights reflects a broader recognition of the rights of animals.

Gillespie notes: "This strict comparison is an important point, as the claim is not that equal sentience leads to equal consideration in all matters, such as an animal’s right to vote. Rather, that such a capacity leads to the necessity of weighing like interests equally. Animals, unlike humans, clearly have no interest in voting but they do have an interest, as humans do, in avoiding pain."

Id.

with the increasing focus on rights concepts and language generally that characterized the latter half of the twentieth century and continues into the present, and is also consistent with an arguably decreasing emphasis on public duties and responsibilities. As Mary Ann Glendon noted, “To a great extent, the intellectual framework and the professional ethos of the entire current population of American lawyers have been infused with the romance of rights.”

She adds that “[d]iscourse about rights has become the principal language that we use in public settings to discuss weighty questions of right and wrong . . . .”

Fundamental rights are appropriately at the core of our values, but more is not always better. Rights cannot expand without limits, and all rights entail costs. Potential assertions of rights exist in competition. If an individual seeks to enter a neighbor’s home without consent, the homeowner’s private property rights conflict with and trump the intruder’s right to move about freely. With an ever expanding list of problems addressed as rights issues, the significance of fundamental human rights is cheapened.

This Article asserts that shifting the focus of animal welfare issues from human responsibility to animal rights provides a singular illustration of overburdening the rights paradigm. Shifting focus away from human responsibility for animals’ welfare is harmful both for animals and for human society. Part II of this Article addresses the rights paradigm’s expansion in societal discourse. It documents the increasing attractiveness of rights language over the past sixty years and explores the foundations for this “romance” with the more-is-better view of rights.

Part III confronts rising calls to assign basic rights to animals. It begins by addressing comparisons frequently made by advocates of animal rights between their struggle and the struggle against slavery and racial discrimination. Such comparisons are highly problematic and are arguably offensive to many humans. Part III also analyzes comparisons that animal rights advocates make between some animals and some entities for which rights are presently recognized. Specifically, Part III analyzes comparisons between intelligent animals such as chimpanzees and nonhuman entities such as corporations and ships that are considered persons for some purposes in law. Such comparisons have proven attractive to advocates of animal rights as potential precedents for assigning rights to nonhumans. Part III considers and ultimately rejects such comparisons as

24. GLENDON, supra note 2, at 5.
25. Id. at x.
26. See infra notes 281–301 and accompanying text.
27. See infra notes 292–95 and accompanying text.
28. See GLENDON, supra note 2, at 5.
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a basis for assigning rights to animals. This analysis begins by exploring the history of and competing theoretical bases for legal personhood for corporations, examining the artificial entity theory, the aggregate theory, and the real entity theory, and the nexus of contracts theory of corporate personhood. Part III concludes that all of these theories share a common theme: that corporate personhood is ultimately focused on humans. Corporations are proxies for human interests, and thus corporate personhood is an extension of human personhood. The same is true regarding the practice of admiralty courts in treating ships as persons in some contexts. This is not done because of abstract concern for the rights of ships; rather, ships are treated as proxies for their human owners. Of course unlike corporations and ships, animals are not fictitious surrogates for humans.

Part IV asserts the centrality of humanity to rights. It begins by addressing the concept of personhood, and it presents the theory of contractualism as particularly useful in understanding why rights are, in practice, limited to humans and their proxies. Although theories of rights abound, contractualism resides closest to the foundations of our legal system and the common understandings and values that form the basis of our society.29 Beginning with studies of the American Revolution as children, Americans are taught to perceive rights in terms of the social contract, and rights are intertwined in common understanding with moral agency and responsibilities.30 Under this view, infants and mentally incapable adults are assigned rights because of their perceived closeness to humans with moral agency and responsibility, even if they do not at present possess those characteristics themselves.31 In exploring these issues and their implications for extending rights to animals, Part IV cautions against the trend to overstate similarities between humans and some intelligent animal species, such as great apes.

Part V explores some of the costs that might be incurred in extending the rights paradigm to animals. Although accurately assessing all of these costs is not possible, Part V focuses on some related categories of potential costs that are particularly significant. First, Part V addresses the possibility that creating animal rights may do as much to lower the status of humans as it does to raise the status of animals.32 Whereas the

29. See infra notes 252–55 and accompanying text.
30. See infra notes 243–44 and accompanying text.
31. See infra notes 256–79 and accompanying text.
32. See infra notes 282–91 and accompanying text.
intent may be to treat some animals more like humans, an effect of diluting rights status could be to treat some humans more like animals.

A related concern is that the rights competition generated between animal rights and existing human rights raises the potential for disruptive economic and political upheaval. For example, diminishing human property rights to make way for new animal rights could cause financial losses in agriculture, medicine, and clothing production.\footnote{33} Ideally, the humans most powerfully disadvantaged by these new rights for animals would likely be those near the bottom of the world’s economic ladder, who often are deprived of basic human rights. Further, human expressive rights, such as scientists’ First Amendment right to engage in scientific research, would be implicated. Such rights competition, of course, does not by itself require a conclusion that rights is an inappropriate paradigm for animal welfare, but it must be considered as an important part of the question.

The Article concludes that rejecting the rights paradigm is not harmful to animals’ interests. Indeed, it is ultimately more helpful to animals because it firmly designates and anchors responsibility where responsibility in reality lies: with humans.\footnote{34} Indeed, centering on human responsibility may well be an appropriate reason to adopt some of the less extreme animal protections sought by animal “rights” activists. However, for the welfare of both humans and animals, focus must remain on the reality of human moral agency and obligation rather than on the fantasy of animals as appropriate bearers of rights.

II. THE EXPANDING RIGHTS PARADIGM IN SOCIETAL DISCOURSE

Rights is a “loaded term” in legal philosophy that “can be considered in many ways.”\footnote{35} Consensus on the nature of rights or even agreement on how rights should be defined is elusive. However, there is appropriate popular consensus that some fundamental rights, such as the right to freedom of expression, are at the core of liberty.\footnote{36} The United States Constitution’s Bill of Rights provides an essential foundation of the nation’s identity.\footnote{37}

\footnotesize
33. See infra notes 296–98 and accompanying text.
34. See infra note 310 and accompanying text.
36. See 1 Annals of Cong. 431–40 (Joseph Gales ed., 1789), reprinted in Douglas W. Kmiec et al., Individual Rights and the American Constitution 30 (2d ed. 2004) (citing James Madison as stating that the “freedom of the press, as one of the great bulwarks of liberty, shall be inviolable”).
Allowing slavery to survive creation of the Constitution and the Bill of Rights tainted American ideals from the nation’s inception, and of course the toxic effects of this injustice are still evident in the present. After a bloody civil war ended slavery but did not end state-sanctioned racial discrimination, distrust of existing democratic processes as a means of achieving racial justice became increasingly entrenched. Particularly in the South, disenfranchisement produced all-white governments radically opposed to reform. Alabama governor George Wallace’s political theater in dramatically pronouncing “[s]egregation now, segregation tomorrow, segregation forever” in opposition to federal court-ordered integration at the University of Alabama was playing to his base; he knew that at that time the state and local political arena in Alabama belonged overwhelmingly to whites.

As the civil rights movement gathered steam in the 1950s and 1960s and encountered resistance from elected officials, activists increasingly looked to courts rather than elections—at least state and local elections—as a primary vehicle for reform. Especially in the South, racist elected
judges and all-white juries made reliance on even the courts problematic.\textsuperscript{41} Civil rights activists learned that federal court judges applying the United States Constitution or federal civil rights laws were more likely to provide racial justice than were juries or the stacked-deck political arena.\textsuperscript{42}

Both the Civil Rights Act of 1964\textsuperscript{43} and the federal court lawsuits that empowered the civil rights movement spoke, eloquently and effectively, in the language of rights. The rights asserted—freedom from irrational discrimination by government in the form of racial discrimination—were of course central to human dignity and justice. Over time, a societal consensus developed that such claims entailed fundamental public facilities; legislatures declared that they would not dismantle Jim Crow . . . . Meanwhile, the fortunes of liberal or populist white politicians who displayed any sympathy with blacks . . . were spiraling into decline.”); Gerald M. Stern, Judge William Harold Cox and the Right to Vote in Clarke County, Mississippi, in SOUTHERN JUSTICE 165, 165–68 (Leon Friedman ed., 1965) (giving a first-hand account of one of the first voting discrimination cases brought by the United States).

\textsuperscript{41} In 1955, two white men were tried in Mississippi for abducting, murdering, and mutilating a young African-American teenager for allegedly making a suggestive remark to a white woman. An all white jury acquitted the men despite strong evidence of guilt. William Bradford Huie, The Shocking Story of Approved Killing in Mississippi, LOOK, Jan. 24, 1956, reprinted in THE LynchIng of Emmett Till: A DOCUMENTARY NARRATIVE 200, 200–08 (Christopher Metress ed., 2002). Similarly, in 1964, three civil rights activists were murdered in Mississippi when a local sheriff stopped their car only to release them into the Ku Klux Klan’s custody. HOWARD BALL, JUSTICE IN MISSISSIPPI: THE MURDER TRIAL OF EDGAR RAY KILLEN 35–46 (2006). The U.S. Department of Justice and the FBI were forced to pursue their own investigation, due to the lack of cooperation from Mississippi. \textit{Id.} The Governor suggested that the activists were enjoying the nightlife of Havana, Cuba, while a Mississippi Senator insisted that the activists’ disappearance was merely a “publicity stunt.” \textit{Id.} at 38. Of the eighteen Klansmen finally charged with conspiracy to murder, an all-white jury found only seven guilty, all of whom were released less than a decade later. \textit{Id.} at 46. In 2005, forty years after the murders, Mississippi finally charged and convicted Edgar Ray Killen, the Klan ringleader of the murders, on three counts of murder. \textit{Id.} Killen’s conviction was Mississippi’s only prosecution for the murders. \textit{Id.; see also} Shaila Dewan, Ex-Klansman Guilty of Manslaughter in 1964 Deaths, N.Y. TIMES, June 22, 2005, at A1, available at http://query.nytimes.com/gst/fullpage.html?res=9F03EFD9113BF931A15755C0A9639C8B63.

\textsuperscript{42} See RODGERS & BULLOCK, supra note 40, at 24. A study conducted from 1954 to 1963 reported that African-American plaintiffs won only twenty-nine percent of cases involving race in southern state courts but fifty-one percent of the cases in southern federal district courts. \textit{Id.} at 51; \textit{see also} RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 263 (2d ed. 2004) (“[S]ince most of the municipal, county, and state courts, particularly in the South, were unfavorably disposed toward the African American’s aching grievances, NAACP lawyers and other counsel to black litigants were becoming deeply enmeshed in the [federal] appeal process.”); Michael Meltsner, Southern Appellate Courts: A Dead End, in SOUTHERN JUSTICE, supra note 40, at 136, 136–54.

freedoms to which all citizens are entitled. This developing societal consensus that the rights paradigm must be expanded was laudable, even heroic, in recognizing fundamental freedoms at the core of liberty. In this context, expanding rights spectacularly succeeded, and in the process, rights language rose in stature. Societal consensus that the costs of this rights expansion were negligible in comparison with its benefits ensured that many or most Americans could enjoy a relatively unmitigated positive reaction to the change. Rights concepts increasingly came to be thought of as a vehicle for societal reform, and since the civil rights movement, rights concepts have continued to rise in prominence as an answer to societal ills in general.

This trend received a significant boost through the Warren Court’s extension of many parts of the Bill of Rights to action by state governments. Prior to the latter half of the twentieth century, lawsuits invoking the United States Constitution tended to focus on the limits of federal authority versus state authority, and the division of power within the federal government—for example, the scope of executive power versus Congress’s power. Under this paradigm, it is not surprising that the constitutional law experts of the New Deal centered their attention on “the overall design of government and to the functions and relations among its specialized organs,” rather than on individual rights.

Over time, however, and perhaps fueled by the inadequacy of state political processes in the South to remedy systematic deprivations of civil rights discussed above, the Supreme Court developed the incorporation doctrine. Under this doctrine, the Fourteenth Amendment incorporates

44. See Kluger, supra note 42, at 711–14 (discussing the nation’s reaction to Brown v. Board of Education and other similar cases); see also Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431, 453–58 (2005) (tracing the national reaction to Brown v. Board of Education).

45. For example, as the justness of the cause of racial civil rights gained broad acceptance, relatively few Americans would have felt it appropriate to complain that equality for African-Americans in the job market would interfere with the advantage in the job market racial discrimination allowed for whites. Incurring the “cost” of whites having to compete on a more even playing field is so consistent with notions of justice that even considering it as a cost seems inappropriate.


47. Glendon, supra note 2, at 5.
the rights recognized by the Bill of Rights’ first eight Amendments, thus preventing state governments from violating the rights guaranteed under the first eight Amendments. Creating the incorporation doctrine had the effect of dramatically expanding the scope of individual rights litigation under the Federal Constitution. State and local government is much more involved in the everyday lives of citizens than is the federal government, and constitutionalizing claims of rights violations by state and local government provided endless new possibilities for constitutional rights litigation. In the wake of this development, at present, “the bulk of the Court’s constitutional work involves claims that individual rights have been violated.”

Although this evolution may have its roots in the glory of the civil rights movement’s call for racial equality, its expansion into other areas continues. Many of these expansions have been, with varying degrees of credibility, promoted as extensions of the principles of justice and equality that illuminated the civil rights movement. For example, the movement to seek equal rights for women was not generated by the struggle for racial civil rights, but connections between the two are apparent, and the struggle for gender equality was aided by successes in the struggle for racial equality.

The same may be said of the movement for expanded rights for children. Until relatively recent times, children were viewed at least technically as property under the law in many contexts. Child protection statutes began taking hold in the 1800s, and spread to all states in the twentieth century. However, children’s rights seemed to expand further in the wake of the civil rights movement’s general expansion of

49. AMAR, supra note 48, at 391 (“Every . . . citizen would be entitled to claim a host of fundamental rights and freedoms (including the right to equality) against his or her own home state.”); GLENDON, supra note 2, at 5.
50. GLENDON, supra note 2, at 5; see also BAUM, supra note 46, at 163, 165–67.
52. See Annette Ruth Appell, Representing Children Representing What?: Critical Reflections on Lawyering for Children, 39 COLUM. HUM. RTS. L. REV. 573, 577 n.8 (2008); Cupp, supra note 9, at 23.
the rights paradigm. For example, in the early 1970s, some courts began allowing children to assert tort claims against their parents.54

Advocates of sexual expression rights followed with interest the expansion of rights in other areas. Inspired by successful efforts to further racial equality, gay rights activists increasingly found their voices and spoke the language of rights. In Bowers v. Hardwick55 in 1986 and in Lawrence v. Texas56 in 2003, the Supreme Court addressed equal protection and due process rights in the context of sexual orientation, with increasing deference for conceptualizing consensual sexual expression as a protected right.57

In recent years, arguments for a right of marriage for homosexuals have taken on particular prominence, both in the media58 and in the courts.59 In May 2008, the California Supreme Court’s decision in In re Marriage Cases60 garnered national attention in holding that the privacy and due process provisions of the California State Constitution guarantee the basic civil right of marriage to all individuals and couples, regardless of sexual orientation.61 The Court also held that the California Family

54. See, e.g., Gibson v. Gibson, 479 P.2d 648, 653–54 (Cal. 1971) (abolishing parental tort immunity in California by permitting an unemancipated child to sue his parent for negligence in operating an automobile).
55. 478 U.S. 186, 196 (1986) (holding that Georgia’s sodomy statute did not violate the fundamental rights of homosexuals).
56. 539 U.S. 558, 578 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated homosexuals’ right to liberty under the Due Process Clause).
60. In re Marriage Cases, 183 P.3d 384 (Cal. 2008).
61. Id. at 399.
Code provision that limits marriage to a union “between a man and a woman,” and states that “only marriage between a man and a woman is valid or recognized in California” violates the state constitution’s equal protection clause, and encroaches on fundamental privacy rights of same-sex couples.62

In November 2008, a California ballot initiative titled Proposition 8 effectively overruled In re Marriage Cases through a state constitutional amendment banning same-sex marriage.63 Activists plan to challenge the legality of Proposition 8, taking the battle into the courts.64 Supporters of the In re Marriage Cases decision—and gay rights advocates in general—often point to the civil rights movement as both a roadmap for their cause and as a source of inspiration.65

The rights revolution that was so important to advancing racial equality has spread further than these most familiar areas. For example, a rising interest in “consumer rights” developed alongside the civil rights movement. As with civil rights, courts spearheaded the consumer rights revolution. Expansive new civil liability rules for defective products in the late 1950s and early 1960s based on jettisoning traditional privity limitations and on the new concept of strict liability in tort placed dramatic new emphasis on safety rights of consumers.66 Ralph Nader’s landmark book Unsafe at Any Speed67 caught the nation’s mood in 1965 and launched Nader into national prominence as an advocate for consumer rights.68 Political manifestation of consumers’ rights followed the courts’ lead. For example, Congress established the Consumer Product Safety Commission in 1972 to limit accidents caused by unreasonably unsafe products.69

62. Id. at 400, 402.
64. Id.
Presently, many areas of agitation for societal reform may be, and often are, presented as a matter of extending rights. Advocates speak of nonsmokers’ rights, of smokers’ rights, of students’ rights, of parents’ rights, of grandparents’ rights, of prisoners’ rights, of disability rights, of immigrants’ rights, of the right to die, of the right to life, of the right to choose abortion, and of any number of other asserted rights, including, of course, animal rights.

One might speculate as to whether the rise in wealth in the middle classes and the United States’ seemingly bright future in the years following World War II contributed to an increasing emphasis on the individual. Perhaps a particularly good economic outlook and national self-confidence allowed more energy to be expended seeking personal self-fulfillment and personal rights. Perhaps also increasing employment opportunities for African-Americans and women necessitated by labor shortages during World War II provided heightened awareness regarding the imperative of equal treatment.

Whatever the causes, the postwar era, especially the 1960s, generated a new mindset in the United States. Lyndon Johnson’s “Great Society” significantly expanded welfare and social programs with the goals of furthering equality and protecting individuals who had been left behind during a time of optimism and national prosperity. Dubbed the “Me Generation” by critics, youth in the 1960s famously valued individuality and emancipation from traditional societal restrictions at a level not previously experienced in the United States. These political and societal developments both reflected and encouraged the increasing emphasis on

70. Perhaps this would include even the right to entertainment. A popular song in the 1980s reflected the ubiquitousness of the rights paradigm in society with an emphatic insistence that “you’ve got to fight, for your right, to party.” BEASTIE BOYS, Fight for Your Right, on LICENSED TO ILL (Def Jam 1986).


74. See Landon Y. Jones, GREAT EXPECTATIONS: AMERICA AND THE BABY BOOM GENERATION 254 (1980) (“For most of human history, people had thought that life was hard, brutal, and tragic. But the baby boom’s early affluence developed in it . . . ‘the psychology of entitlement.’ What other generations have thought privileges, the baby boomers thought were rights.”).

an individual rights paradigm as a vehicle for addressing conflicts and seeking reform.

This Article’s analysis is not directed toward criticizing human rights that have been extended—and are still being sought—on the basis of race, gender, disability, sexual orientation, or any other grounds. Indeed, much of the increasing emphasis on individual human rights has been needed, with the struggles for racial and gender equality standing out as the most obvious but not the only examples. Rather than broadly attacking rights emphasis per se, this analysis is intended to provide context and background for current arguments that animal welfare issues should be viewed as a question of rights. Given the “romance of rights” in recent years that has manifested itself in a variety of ways, an impulse to view problems involving animal welfare under this paradigm is not surprising. Animal welfare issues, however, are fundamentally different from the expanding rights issues addressed above. Every other significant area of potential rights expansion is argued in terms of advancing human dignity and freedom. Arguments for animal rights are the first serious efforts to consciously divorce rights concepts from a focus on humanity.

III. RISING CALLS TO ASSIGN RIGHTS TO ANIMALS

The animal rights movement has existed for many years, but it has changed dramatically in the past decade. Early activists focused on animal welfare rather than rights. Organizations dedicated to opposing cruelty to animals began forming in the 1800s and had broad success in lobbying for states to enact anticruelty laws. Eventually every American

76. See GLENDON, supra note 2, at 5.
77. “Computer rights”—rights for computers that attain a level of artificial intelligence comparable in some ways to human intelligence—have been discussed as an abstract concept, but no significant groups are actively lobbying for an extension of computer rights given the wide gap that still exists between computer intelligence and human intelligence. See Lawrence B. Solum, Legal Personhood for Artificial Intelligences, 70 N.C. L. REV. 1231, 1255–81 (1992); see also MARVIN MINSKY, THE SOCIETY OF MIND 25–30, 186–94 (1986); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 156–58 (2000) (reflecting on whether some day computers may attain consciousness); Cupp, supra note 9, at 19–20 (noting that if animals are assigned rights based on intelligence, rights for computers may require consideration on the same basis at some point); Richard A. Posner, Animal Rights, 110 YALE L.J. 527, 531 (2000) (reviewing Wise, supra, and noting that one day computers and chimpanzees will be “wired” similarly and will have similar numbers of “neurons”). Hollywood has also addressed implications of evolving levels of artificial intelligence in movies such as AI and I, Robot.
78. Huss, supra note 35, at 52–53.
79. See DAVID FAVRE & PETER L. BORCHELT, ANIMAL LAW AND DOG BEHAVIOR 258–59 (1999); Huss, supra note 35, at 52–53.
jurisdiction enacted some form of animal protection. However, judges often assumed that “their purpose was to protect human morals, not animal bodies.”

In 1975, philosopher Peter Singer published his landmark book *Animal Liberation*, which inspired a growing group of activists to think in terms of rights for animals. However, many early rights activists lacked legal sophistication. Singer is a philosopher rather than a legal scholar, and his work reflects his training. Many early arguments for animal rights focused on moral, ethical, and philosophical grounds rather than on legal analysis. Concrete legal doctrines and principles were not at the forefront of the struggle.

By the 1970s, the civil rights movement was well underway, and, as it did for other areas in which expanded rights were sought, the movement provided an example of success and perhaps something of a roadmap. Rebecca Huss notes that “[s]everal animal rights activists make analogies to slavery and the civil rights struggles of the last century.” Richard Ryder, who is credited with coining the term *speciesism* to describe perceived human chauvinism in ignoring the rights of other species, has explained that, after the attacks upon racism and sexism, it seemed only logical to attack speciesism. As animal rights activists have developed an increasing focus on law and on legal rights, they increasingly have compared the movement for animals’ rights to the movements for both racial and gender equality rights.

80. See Wise, supra note 77, at 44.
81. Id.
82. Peter Singer, *Animal Liberation*, at vii–xiii (new rev. ed. 1990). Despite serving as an inspiration for many advocates of “rights” for animals, in this work, Singer seems to express a preference for language of “equality” rather than rights; he describes rights language as “a convenient political shorthand.” Id. at 8.
83. See Cupp, supra note 9, at 3–4 (noting Singer’s impact on the early animal rights movement).
85. See supra notes 51–69 and accompanying text.
The writings of Steven Wise, perhaps the most prominent legal apologist for extending rights to at least some animals, are illustrative of analogies to the struggle against slavery and its aftermath that demonstrate an increasing emphasis on achieving rights through the courts. Although he has taught Animal Law at Harvard Law School and at other law schools, Wise is also a practicing attorney. Describing himself as an “animal protection lawyer,” he specializes in cases involving animals, and is an advocate of assigning personhood, and thus rights, to particularly intelligent animals.

In his influential 2000 book *Rattling the Cage*, Wise relies on two cases that address slavery to “set the stage” for his argument to assign personhood to intelligent animals—*Somerset v. Stewart* and *Dred Scott v. Sandford*. *Somerset* was a pivotal 1772 English case in which the lawyer for a slave seeking freedom asked the court “upon what Principle is it—can a Man become a Dog for another Man[?]” The court’s decision freeing the slave led to the abolition of slavery in England. Wise emphasizes the court’s holding that a strong moral imperative against slavery required the court to act regardless of the potential for serious economic consequences—presumably as an analogy to the modern argument that a strong moral imperative requires assigning rights to some animals even if this might entail serious economic consequences.

The 1857 *Dred Scott* case, better known to Americans, is ignominious. Finding in the tense period just before the Civil War that blacks are “beings of an inferior order, and altogether unfit to associate with the

91. See generally Wise, supra note 77.
92. Id. at 49.
94. 60 U.S. (19 How.) 393, 404–08 (1857).
96. See Cupp, supra note 9, at 21.
97. See Wise, supra note 77, at 49–50; see also Cupp, supra note 9, at 21–22.
white race,” Chief Justice Roger Taney held that they could be “treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.” Wise uses this case to demonstrate that living beings found by law to be things—African-Americans in 1857, and animals at present—are not granted legal capacity to sue under the law.

Wise argues that humans long ago began applying what we had learned about domesticating wild animals to enslave each other. He further asserts:

[As our domestication of wild animals served as an unprincipled model for our enslavement of human beings, so the destruction of human slavery and all its badges can model the principled destruction of chimpanzee and bonobo slavery. Determining the dignity-rights of chimpanzees and bonobos in accordance with fundamental principles of Western law—equality, liberty, and reasoned judicial decisionmaking—reemphasizes and reinvigorates these principles just as the abolition of slavery and its badges did.

Although slavery and the civil rights movement are probably many animal rights activists’ most frequently used analogies, other successful rights movements are analogized as well. For example, one writer stated that “what has happened over the years is that there have been a lot of strategic and savvy people who have been able to use various notions like rights . . . to move things forward and to have progress. . . . We saw it with women’s rights. We saw it with children’s rights and we’re seeing it with animal rights . . . ."

Drawing a parallel between the struggle to attain rights for historically oppressed categories of humans and the struggle to attain rights for animals is controversial and is offensive to some. Some opponents of rights for animals “find the analogy of the development of rights of African-Americans and women to the development of rights for animals inappropriate, as well as distasteful.” Although no offense is intended

98. Dred Scott, 60 U.S. at 407.
99. Id.
100. See Wise, supra note 77, at 61 (“It turned out that Scott had no legal capacity, and therefore no power, to sue in a federal court. One hundred and forty years later, another federal judge said that Kama [a dolphin Mr. Wise asserted to represent in a lawsuit] had no legal capacity either.”).
101. Id. at 261.
102. Id.
104. See Huss, supra note 35, at 68. Cass Sunstein also makes this point, noting that “[f]ew people accept that particular analogy [between animal mistreatment and
with such comparisons, one need not be an opponent of animal rights to find them troubling. The struggle for human rights is broadly perceived as being among humanity’s most important endeavors. Speaking about animal rights and human rights in the same breath and with the same fervor may be perceived as raising the status of animals, but it equally may be perceived as lowering the status of humans. This demonstrates one of the fundamental challenges to arguments for extending rights to animals, rather than focusing on humans’ responsibility to act humanely toward animals. If animals are placed in the same category as persons, human dignity may be diminished as much as animal dignity is—in theory—enhanced.105 Further, thinking of humans in the same way as one thinks of animals does not further the premise of human responsibility, which is the foundation upon which any hope of improved treatment of animals must ultimately rely.106

In addition to comparing the animal rights movement to historic movements to broaden human rights, some animal rights theorists highlight situations in which courts have assigned rights to other types of nonhuman entities and to humans with less intellectual attainment than some animals. Specifically, some activists note that courts have recognized a form of legal personhood for corporations, ships, infant humans, and mentally incapable adult humans.107

Those asserting that rights should be assigned to animals are divided as to which animals should receive those rights. Some activists argue that animals should be assigned rights if they have the capacity to suffer.108 Others argue that—at least as a first step—assertions of rights

human slavery]; many people find it offensive.” Sunstein, supra note 7, at 4. Although Sunstein may be correct among the population at large that relatively few people accept the analogy to slavery, it appears to be a fairly common point of emphasis among many animal rights activists. For further criticism, see David R. Schmahmann & Lori J. Polacheck, The Case Against Rights for Animals, 22 B.C. ENVTL. AFF. L. REV. 747, 780–81 (1994), noting that:

While it may be true that in the context of the relatively brief span of American history the experience of women and African-Americans has been one of ascending from subordination to relative political empowerment, it does not follow that political empowerment is a constantly expanding process, destined eventually to empower not only animals but even other entities not yet fully identified.

Id. 105. See infra notes 292–95 and accompanying text.
106. See infra note 310 and accompanying text.
107. See infra notes 132–201 and accompanying text.
108. See, e.g., Cass R. Sunstein, Standing for Animals (with Notes on Animal Rights), 47 UCLA L. REV. 1333, 1363 (2000) (“The capacity to suffer is . . . a sufficient basis for legal rights for animals); see also Bentham, supra note 86, at 311 (“[T]he question is not, Can they reason? nor, Can they talk? but, Can they suffer?”); Singer, supra note 82, at 238 (noting that Richard Wasserstrom’s article Rights, Human Rights and Racial Discrimination states that there is a human right to well-being and “that to

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should only focus on animals with particularly high intelligence—intelligence comparable in some ways with human children.\textsuperscript{109} Steven Wise is a leader among those arguing that animal intelligence should be an important consideration in deciding whether to assign rights. He argues for this approach on pragmatic grounds, asserting that efforts to attain rights are most likely to succeed if they are focused on particularly intelligent animals that are the most like humans.\textsuperscript{110} Wise focuses his analysis of animal intelligence on “practical autonomy”; he argues that
deny someone relief from acute physical pain makes it impossible for that person to live a full or satisfying life”). Singer notes that this benefit can be enjoyed by nonhumans as nonhumans experience pain; thus, “if human beings have a right to relief from acute physical pain, . . . [a]nimals would have it too” because they can suffer and feel pain. \textit{Id.} 109. See, for example, Tom Regan, \textit{The Case for Animal Rights}, \textit{in IN DEFENSE OF ANIMALS, supra} note 87, at 13, 16–17, 23, who notes:
Well, perhaps some will say that animals have some inherent value, only less than we have. Once again, however, attempts to defend this view can be shown to lack rational justification. What could be the basis of our having more inherent value than animals? Their lack of reason, or autonomy, or intellect? Only if we are willing to make the same judgment in the case of humans who are similarly deficient. But it is not true that such humans—the retarded child, for example, or the mentally deranged—have less inherent value than you or I. Neither, then, can we rationally sustain the view that animals like them in being the experiencing subjects of a life have less inherent value. \textit{All who have inherent value have it equally, whether they be human animals or not.} \textit{Id.} See also Steven Best, \textit{Legally Blind: The Case for Granting Animals Legal Rights}, IMPACT PRESS, Aug.–Sept. 2002, http://www.impactpress.com/articles/augsep02/blind8902.html, who argues:
It is a flagrant contradiction to grant a severely impaired human being personhood but deny it to a more intelligent and aware ape, or any other complex animal. If entities such as corporations can be considered as a “person” in the courts, it shouldn’t be too far a stretch to treat an animal as such.
According to an ancient rule of equality, you are entitled to basic legal rights if you are similar to another creature who has those basic legal rights. Say a baby is born in a hospital without a brain. Judges give that little girl the right to bodily integrity. On the other hand, a bonobo like Kanzi [a chimp who has been trained to communicate using symbols] can understand in excess of 3000 human words, can probably count, and functions at the level of a human three-year-old. Kanzi, however, is categorized as a legal thing, while this anencephalic girl who is not even conscious is a legal person.
\textit{Id.} 110. In arguing for the practical advantages of an intelligence approach, Wise concedes it would not be his first choice if he were not taking practical considerations into account: “If I were Chief Justice of the Universe, I might make the simpler capacity to suffer, rather than practical autonomy, sufficient for personhood and dignity-rights.” \textit{WISE, supra} note 89, at 34.
any creature that is intelligent enough to demonstrate practical autonomy deserves to be assigned rights.111 According to Wise:

    [A] being has practical autonomy and is entitled to personhood and basic liberty rights if she: 1. can desire; 2. can intentionally try to fulfill her desires; and 3. possesses a sense of self sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it.112

Wise pays particular attention to chimpanzees and bonobos as animals he believes often meet his standard of practical autonomy, but he explores the possibility of practical autonomy for other types of animals as well, including orangutans, gorillas, honeybees, African Grey parrots, dogs, dolphins, and elephants.113

Supporters of rights for intelligent animals do not argue that they should receive all rights that competent adult humans enjoy. For example, most rights activists would not assert that animals should be permitted the right to vote, on the same basis that children and incapable adults are not permitted the right to vote.114 Rather, activists typically assert that intelligent animals should be permitted basic dignity rights, such as freedom from having their bodies used or experimented upon without consent—rights of “bodily integrity and bodily liberty.”115

Comparisons to rights for nonhuman entities, infants, and mentally incapable adults are especially significant to activists who argue that rights should at least be assigned to particularly intelligent animals. Such comparisons strikingly raise the question of why intelligent animals should not be granted some level of rights when less intellectually capable humans and entities with no natural life at all are given some rights. As one writer asserted, “[t]he elevation of certain animals to personhood status for particular purposes is supported by the granting of similar status to other nonhumans.”116

Philosophers predating enhanced understanding of animals’ minds often argued that animals are different from humans in that animals do

111. Id. at 32.
112. Id.
113. See id. at 49–230.
114. See Wise, supra note 77, at 243–48 (conceding that animals’ rights should be limited because—although they may have practical autonomy—they do not have full autonomy); Sunstein, supra note 7, at 11 (noting that arguments for animal rights “of course” do not mean that animals “can vote or run for office;” instead “[t]heir status would be akin to that of children—a status commensurate with their capacities”); see also Adam J. Fumarola, With Best Friends Like Us Who Needs Enemies? The Phenomenon of the Puppy Mill, the Failure of Legal Regimes to Manage It, and the Positive Prospects of Animal Rights, 6 Buff. Envtl. L.J. 253, 283–89 (1999) (arguing that animals should be assigned rights, but that their rights should be limited).
115. Wise, supra note 77, at 7, 267.
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not have the ability to truly think or feel.\textsuperscript{117} Aristotle, for example, compared animals to “automatic puppets.”\textsuperscript{118} Augustine opined that animals have no emotions.\textsuperscript{119} In the seventeenth century, Rene Descartes asserted that animals are mere automatons or robots and that they are not able to feel pain, pleasure, or other emotions.\textsuperscript{120} Scientific study, however, has revealed animals to have many attributes and abilities not previously understood. Broad publicity about chimpanzees’ strong genetic similarity to humans, although frequently overstated and misunderstood, has changed the way

\textsuperscript{117} See, for example, 1 AURELIUS AUGUSTINE, THE CITY OF GOD 31–32 (Marcus Dods trans., T & T Clark 1871) (412):

\textquote{Putting aside, then, these ravings, if, when we say, Thou shalt not kill, we do not understand this of the plants, since they have no sensation, nor of the irrational animals that fly, swim, walk, or creep, since they are dissociated from us by their want of reason, and are therefore by the just appointment of the Creator subjected to us to kill or keep alive for our own uses; if so, then it remains that we understand that commandment simply of man. The commandment is, “Thou shalt not kill man;” therefore neither another nor yourself, for he who kills himself still kills nothing else than man.}

\textquote{Id.}

\textsuperscript{118} 1 ARISTOTLE, Movement of Animals, in THE COMPLETE WORKS OF ARISTOTLE 1087, 1092 (Jonathan Barnes ed., 1984).

\textsuperscript{119} GERARD O’DALY, AUGUSTINE’S PHILOSOPHY OF MIND 47, 89 (1987).

\textsuperscript{120} See 3 RENÉ DESCARTES, To Reneri for Pollot, April or May 1638, in THE PHILOSOPHICAL WRITINGS OF DESCARTES 96, 100 (John Cottingham et al. trans., 1991) (1596–1650):

\textquote{Now suppose that this man were to see the animals we have, and noticed in their actions the same two things which make them differ from us . . . . There is no doubt that he would not come to the conclusion that there was any real feeling or emotion in them, but would think they were automatons, which, being made by nature, were incomparably more accomplished than any of those he had previously made himself.}

\textquote{Id. See also Gary L. Francione, The Use of Nonhuman Animals in Biomedical Research: Necessity and Justification, 35 J.L. MED. & ETHICS 241, 244 (2007).}
many humans think about chimpanzees. They now know that chimpanzees have complex social relationships and hierarchies. They use tools, and they are capable of learning a form of sign language, they grieve deaths of companions, and some of them are capable of recognizing themselves in a mirror. Although such comparisons may be quite misleading, some have ventured to assert that chimpanzees have intellectual ability roughly comparable to a two- or three-year-old human child. One legal activist asserts that if chimpanzees and bonobos were given basic dignity rights, humans could only do to them “what you could legally do to a three-year-old child.”

Of course, chimpanzees and other great apes are not alone among animals found to have stronger intellectual abilities than were previously understood. Many news accounts have documented the exceptional intelligence of dolphins. Increasing understanding of some animals’ intellectual, communicative, and emotive abilities provides a surface appeal to arguments that they

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125. See Wise, supra note 77, at 212–13 (relating a story regarding how chimpanzees in the Los Angeles Zoo attempted to rescue a young chimp that had accidentally strangled himself with a nylon rope, and how they grieved following his death).
127. See Dominique Lestel, How Chimpanzees Have Domesticated Humans: Towards an Anthropology of Human-Animal Communication, ANTHROPLOGY TODAY, June 1998, at 12, 13 (discussing a study of a pygmy chimpanzee that “shows a performance of language comprehension which is similar to that of a two year old child”).
should be assigned basic dignity rights, as are infants and mentally incapable adults who may have less ability in all three areas. Highlighting that even corporations and ships—which have no inherent intellectual, communicative, or emotive abilities—are granted rights adds to the surface appeal of arguments for rights for intelligent animals. However, thoughtful analysis of each of these categories of rights bearers demonstrates the inadequacy of such arguments. The rights provided for each of these categories of entities and persons all share a common theme in their ultimate focus on humanity and human interests. Assigning rights to animals would represent a dramatic and harmful departure from the established focus of rights and responsibilities on humans.


Yet nonhuman animals are qualitatively different from other nonhuman entities that have standing to sue on the basis of their own injury, such as corporations and ships. Unlike these entities, nonhuman animals have the ability to engage in various mental processes, such as reason and desire, and they also suffer emotionally and physically as a direct result of pain and trauma. Thus nonhuman animals possess the very characteristics—the ability to suffer and rational thought—that merit the protections that their human counterparts enjoy. . . . Yet inanimate objects often possess more rights than they do.

Id. Cass R. Sunstein explains:

Congress is frequently permitted to create juridical persons and to allow them to bring suit in their own right. Corporations are the most obvious example. But plaintiffs need not be expressly labeled ‘persons,’ juridical or otherwise, and legal rights are also given to trusts, municipalities, partnerships, and even ships. . . . In the same way, Congress might say that animals at risk of injury or mistreatment have a right to bring suit in their own names.

Cass R. Sunstein, Can Animals Sue?, in ANIMAL RIGHTS, supra note 7, at 251, 260–61. Finally, see Laurence H. Tribe, Ten Lesson Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise, 7 ANIMAL L. 1, 2–3 (2001), explaining that:

[T]he truth is that even our existing legal system . . . has long recognized rights in entities other than individual human beings. Churches, partnerships, corporations, unions, families, municipalities, even states are rights-holders; indeed, we sometimes classify them as legal persons for a wide range of purposes. . . . With the aid of statutes like those creating corporate persons, our legal system could surely recognize the personhood of chimpanzees, bonobos . . . . Just as the Constitution itself recognizes the full equality of what it calls natural born citizens with naturalized citizens, who acquire that status by virtue of Congressional enactment, so the possible dependence of the legal personhood of non-human animals on the enactment of suitable statutory measures need not be cause to denigrate the moral significance and gravity of that sort of personhood.

Id.

131. See infra notes 132–201 and accompanying text.
A. Rights for Corporations

“The legal meaning of persons has ‘changed over time,’”132 as the rise of corporate personhood illustrates. In 1819, Chief Justice John Marshall acknowledged corporate personhood. However, he emphasized its symbolic and “artificial” nature. He summarized that “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . .”133 Chief Justice Marshall’s characterization “has become one of the classic definitions of the corporation as a ‘creature’”134—a “mere” creature, no less.135 This is quite different from an animal as a creature because humans create corporations solely to serve human interests. As such, corporations are not natural entities; they exist as legal fictions because treating them as persons for some purposes makes them more useful to humans.

The United States Constitution does not mention corporations, but in the 1800s, lawyers argued that they should be considered “citizens” or “persons” meriting constitutional protection.136 Late in that century, the Supreme Court began finding corporations to be “persons” for some purposes under the Constitution, and in the 1900s, the Court began applying some but not all of the Bill of Rights’ protections to corporations.137 Presently, corporations enjoy Fifth Amendment due process protections, along with “first amendment guarantees of political speech, commercial speech, and negative free speech rights; fourth amendment safeguards against unreasonable regulatory searches; fifth amendment double jeopardy and

136. See Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 HASTINGS L.J. 577, 579 (1990) (“To claim legal status, nineteenth century lawyers argued that corporations should be considered ‘citizens’ or ‘persons’ for application of various constitutional provisions.”).
137. See id. at 582–83 (noting that as “the political and regulatory environment” of the twentieth century changed, “[e]ach development encouraged the corporation to assert Bill of Rights privileges and to abandon the previous, increasingly ineffective, strategy of relying on fourteenth amendment protections”); see also Elizabeth Salisbury Warren, The Case for Applying the Eighth Amendment to Corporations, 49 VAND. L. REV. 1313, 1317 (1996) (“The Court has followed a trend of extending rights to corporations, but it has not agreed to a wholesale application of the bill of rights protections to corporate entities. Instead of granting blanket protection, the Court has approached amendments separately and has used different reasoning in applying them to corporations.”).
liberty rights; and sixth and seventh amendment entitlements to trial by jury. 138

As noted above, several animal rights activists have argued that if nonhuman and even nonsentient corporations are assigned liberty rights, animals—or at least particularly intelligent animals—should be assigned rights too. 139 However, under all theories of corporate personhood, corporations are—at their core—legal pretensions that provide proxies for human interests. Animals are not fictitious surrogates for humans—they are real and distinct beings. Over the years, various theories seeking to explain corporate personhood have been developed. Reviewing these theories demonstrates that all of them share an ultimate focus on the interests of humans.

1. The Artificial Entity—Concession and Fiction—Theory of Corporations

Justice Marshall’s 1819 description of a corporation as an “artificial” being that is a “mere creature” of law provides the essence of what has come to be known as the “artificial entity” theory of corporations. 140 At times this is also referred to as the “concession and fiction” theory, which is sometimes addressed separately but which fits together with the artificial entity doctrine “to form a coherent whole.” 141 The artificial entity theory provides “the standard legal definition of a corporation, an artificial legal person created by state law.” 142 The “concession” aspect of the theory is that the corporation “derives its being [solely] by concession from the State.” 143 Under this theory, corporations are purely

138. Mayer, supra note 136, at 582.
139. See supra note 130 and accompanying text.
140. Woodward, 17 U.S. at 636.
141. See Mayer, supra note 136, at 580 (noting that the “artificial entity” is “[t]he first and most traditional notion[,] . . . viewing the corporation as nothing more than an artificial creature of the state, subject to government imposed limitations and restrictions”).
143. Id.
144. Id.; see also Michael E. DeBow & Dwight R. Lee, Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation, 18 DEL. J. CORP. L. 393, 397 (1993) (“Concession theorists argue that corporations exist at the sufferance of the government, which retains a legitimate role in conditioning its grant of a corporate charter (viewed as the concession of the government) on the receipt of some quid pro quo.”); Liam Séamus O’Melinn, Neither Contract nor Concession: The Public Personality of the Corporation, 74 GEO. WASH. L. REV. 201, 201–02 (2006) (“According to the view
artificial creatures that exist only at the state’s whim. The artificial entity theory dominated the first part of the 1800s. In the early 1800s, corporations were individually created by specific legislative grants from states. Although hardly a novelty at that time, corporations were a much rarer vehicle for conducting business than they are today. Eventually, as corporations grew in number and importance, states began adopting general incorporation statutes, which may have encouraged courts to wander from the artificial entity theory. Although the artificial entity theory has been joined by other theories of corporate personhood, it still pervades formal corporate doctrine and remains prevalent in corporate theory.

The predominance of the artificial entity theory in the development of corporate law doctrine—and its continuing importance at present—does much to answer the argument that animals should have rights because corporations have rights. As artificial entities, corporations are fictitious proxies for the combined interests of their human stakeholders.

that a corporation has its legal origin in a concession by the state, the corporation is a creature of the government and is thus properly subject to regulation.

145. See Phillips, supra note 142, at 1065.

146. Id.; see also John C. Coates IV, Note, State Takeover Statutes and Corporate Theory: The Revival of an Old Debate, 64 N.Y.U. L. Rev. 806, 817 (1989) (“Originally . . . the Jacksonians were opposed to the very existence of corporations . . . [but] once in power, . . . they began a ‘free incorporation movement’ designed to extend the availability of the corporation to all white males. As a result of this movement, states developed general incorporation statutes.”) (footnotes omitted)); Susan Pace Hamill, The Origins Behind the Limited Liability Company, 59 Ohio St. L.J. 1459, 1494–95 (1998) (“Prominent Jacksonians, wanting to cure the evils of special privileges conferred by the special corporate charters, advocated the creation of general incorporation laws that would allow equal access to the corporate form to all those meeting the statutory requirements.”).

147. See Jess M. Kranich, The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation, 37 Loy. U. Chi. L.J. 61, 67 (2005) (“The corporate entity was not a novel concept in America at the time of the nation’s founding, for corporate law was transplanted from England, where theories of the corporate entity were already being developed.”) (footnote omitted)).

148. Id. at 61 (“Over the last two hundred years, the American business corporation has developed from a seldom-used method of doing business into the predominant economic actor in society.”).

149. See Phillips, supra note 142, at 1065 (noting that “[t]he rise of general incorporation statutes also meant that private initiative played an increasingly important role in the formation and behavior of corporations”).

150. See id. at 1065–66.

151. See Kranich, supra note 147, at 71 (“The artificial entity metaphor remained the dominant view of the corporate entity through much of the nineteenth century, and it remains prevalent in corporate theory as well as constitutional law today.”).

152. “Stakeholders” may be a more apt description than the narrower designation of “shareholders,” because corporate theory may consider the interests of humans connected with a corporation beyond the shareholders, such as officers and directors. See infra notes 173–76 and accompanying text.
Similarly, they are assigned rights as a proxy for their human shareholders. Corporate rights are thus, in essence, an extension of the rights of humans. Absent the interests of their human stakeholders, corporate rights would be meaningless.

2. The Aggregate Entity Theory of Corporate Personhood

The aggregate entity theory of corporate personhood was also invoked beginning in the 1800s, and it reached prominence in the latter half of the century. The aggregate entity metaphor portrays a corporation as “an association of individuals contracting with each other in organizing the corporation.” This theory draws analogies to partnerships, where humans sought to benefit by joining together and aggregating their efforts. At first the aggregate theory focused almost exclusively on shareholders as a corporation’s elements. However, later formulations “tended to include various other people who make up the corporation,” such as officers and directors. Some formulations have been even broader in considering entities in relationship with the corporation.

Alexis de Tocqueville’s famous observations regarding Americans’ propensity toward joining together in associations may provide insight regarding the aggregation theory’s roots. As noted above, corporations in early America were not a dominant economic force. However, as de Tocqueville put it, “the right and ability of individuals to form voluntary associations constituted an integral part of the fabric of American society;” these associations included “commercial and manufacturing companies.” The aggregate theory centers on facilitating such partnerships between humans through the use of corporations.

153. See Phillips, supra note 142, at 1065.
154. Philip I. Blumberg, The Corporate Entity in an Era of Multinational Corporations, 15 DEL. J. CORP. L. 283, 293 (1990); see also Krannich, supra note 147, at 72.
155. See Phillips, supra note 142, at 1065 (“[D]uring the latter part of the nineteenth century some theorists began to use partnership analogies to describe the corporation, thereby characterizing it as an aggregate formed by private contracting among its human parts.”).
156. See id. at 1066.
157. Id.
158. Id.
159. See supra notes 146–48 and accompanying text.
Indeed, as with the artificial entity theory—but perhaps in an even more direct manner—the aggregate theory focuses on corporations as creations serving the interests of humans. Justifications for the theory tend to directly address its benefits to individual citizens working together with other citizens. The aggregation metaphor was most influential in the years following Andrew Jackson’s presidency, when corporations became broadly welcomed as a vehicle for empowering individual humans. As Jess Krannich explained in 2005, “[r]ecognizing the capability of the corporate entity as a market participant (especially as the country became increasingly industrial), Jacksonian era corporate theorists began advocating the availability of the corporate entity to every citizen as a means of conducting business.”

He added that “[t]he great innovation of Jacksonian era corporate theorists was to make the general business corporation available to all Americans.” In language even more squarely placing the aggregate theory’s emphasis on serving the goals of individual humans, Krannich further asserted:

Due to the general incorporation statutes, the corporate entity came to be seen “as merely one form of voluntary association, an aggregation of talent and resources, consciously entered into by individuals.” This made it difficult to ignore the individuals behind the corporate fiction. This concept of the corporate entity as a vessel for individual self-realization, coupled with the corporate bar’s strong push for enhanced corporate rights, led to the adoption of the aggregate entity metaphor in corporate and constitutional jurisprudence.

Michael J. Phillips presented the aggregate theory as a form of methodological individualism, which a mid-twentieth century proponent eloquently described as asserting that:

“[T]he ultimate constituents of the social world are individual people . . . . Every complex social situation, institution, or event is the result of a particular configuration of individuals . . . . [W]e shall not have arrived at rock-bottom explanations of such large-scale phenomena until we have deduced an account of them from statements about the dispositions, beliefs, resources, and inter-relations of individuals.”

As demonstrated in these quotations, the humanness of the aggregate theory is manifest. Unlike animal rights, which would be directed at animals as entities completely separate from human creation or identity, the aggregate theory reveals corporations as vehicles for human interests.

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161. Krannich, supra note 147, at 75.
162. Id.
3. The Natural—Real—Entity Theory of Corporations

The natural entity theory of corporations, sometimes called the real entity theory, was in vogue toward the end of the 1800s and at the beginning of the 1900s. Its rise corresponded with the growth of larger corporations, which for a time made the metaphor of a corporation as an aggregation of partners less intuitively appealing than it had been in earlier years. During this period it became apparent—at least in large corporations—that officers and directors rather than shareholders made most of the decisions. This encouraged theorists to increasingly emphasize the separateness between corporations and the immediate actions and influence of their shareholders. Thus, the natural or real entity theory focused on the independence of corporate personhood under the legal fiction that corporations were considered “real” or “natural” entities capable of independent action and deserving of independent rights.

The natural entity theory “is associated with continental theorists who, at the turn of the century, wrote about ‘group’ or ‘corporate’ personality in an effort to challenge individualism and to come to terms with institutions of modern society such as corporations, trade unions, universities, and professional associations.” As this foundation reveals, the natural entity theory was consistent with the artificial entity theory and the aggregate theory in its focus on humanity and human interests, but the natural entity theory centered on the needs and interests of human institutions and groups rather than on narrow individualism. The artificial entity theory and the natural entity theory competed for judicial approval in the 1800s, with courts sometimes favoring one and sometimes the other.

165. See Mayer, supra note 136, at 581 (“By the early twentieth century, the natural entity theory was established firmly, if not permanently.”); see also Charles D. Watts, Jr., Corporate Legal Theory Under the First Amendment: Bellotti and Austin, 46 U. MIAMI L. REV. 317, 326–27 (1991) (“[T]he natural entity theory developed in the 1890s . . . [and] still appears in modern literature [although] it seems to have lost its dominance, at least in the academic community.”).

166. See Phillips, supra note 142, at 1067; see also Dalia Tsuk, Corporations Without Labor: The Politics of Progressive Corporate Law, 151 U. PA. L. REV. 1861, 1872 (2003) (“In part, the success of the natural entity theory of the corporation was due to the inability of the contractual paradigm to accommodate the dramatic changes in business structure at the turn of the twentieth century.”).

167. See Phillips, supra note 142, at 1067 (“[During] the 1880s it was beginning to become clear that management, not shareholders, were the real decision-makers in large publicly owned enterprises.” (quoting Martin Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. VA. L. REV. 173, 206 (1985))).

One scholar has noted that courts’ choices between the theories seemed to hinge on whether the courts accepted rights and personhood for corporations or rejected them: “The ‘artificial entity’ theory was invoked to deny corporations constitutional protection; the ‘natural entity’ theory was used to accord them safeguards.”

Perhaps the most significant case favoring the natural entity theory was *Santa Clara County v. Southern Pacific Railroad* in 1886. In that case, the Supreme Court for the first time granted constitutional rights to a corporation, holding that the Fourteenth Amendment’s Due Process Clause prohibited a California county from taxing a railroad’s property differently from how it taxed human citizens’ property. Other constitutional protections developed over time, but the natural entity theory’s emphasis on the corporation as a distinct and independent entity is perceived as facilitating this initial foray into constitutional rights for corporations.

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169. *Id.* at 581.
171. *Id.* at 417, aff’g 18 F. 385, 401–02 (C.C. Cal. 1883) (“That the proceeding by which the taxes . . . were levied against the railroad companies . . . was not due process of law, seems to me so obviously true as to require no further illustration . . . . In neither view . . . . was the assessment valid, and the taxation levied upon it cannot be sustained.”). The lower court explained:

> [T]he members [of a corporation] do not, because of such association, lose their rights to protection, and equality of protection. They continue, notwithstanding, to possess the same right to life and liberty as before, and also to their property, except as they may have stipulated otherwise. As members of the association—of the artificial body, the intangible thing, called by a name given by themselves—their interests, it is true, are undivided, . . . but it is property, nevertheless, and the courts will protect it, as they will any other property, from injury or spoliation.

18 F. at 402–03. The Supreme Court, while affirming the holding of the lower court, did not specifically address the due process issue in its opinion. However, at the beginning of the arguments, then-Chief Justice Waite explained there was no need to discuss whether the Fourteenth Amendment applied to corporations because the whole Court thought it did. *See* 118 U.S. at 396 (“The court does not wish to hear argument on the question whether the [equal protection] provision in the Fourteenth Amendment . . . applies to these corporations. We are all of opinion that it does.”). Despite the dearth of analysis of the Fourteenth Amendment in its actual opinion, by affirming the lower court decision, the Supreme Court established that corporations were persons within the meaning of the Fourteenth Amendment. *See*, e.g., *Gulf, Colo. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) (“It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States.”) (citing a list of Supreme Court cases beginning with *Santa Clara County*).

172. *See* Mayer, *supra* note 136, at 581. In addition, *see* Tsuk, *supra* note 166: As early as 1886, in *Santa Clara County v. Southern Pacific Railroad Co.* . . . the Supreme Court declared that corporations were protected by the safeguards of the Fourteenth Amendment’s Equal Protection and Due Process clauses. . . . Supreme Court decisions consistently reinforced the natural entity paradigm by upholding “the personhood of corporations with respect to property rights,” especially in cases relating to the Equal Protection and Due Process Clauses.
Although apologists for the natural entity theory differ as to a corporation’s nature, many seem to downplay analogies to an organic being. Some argue that a corporation is best viewed “as a system: a network whose human and nonhuman components form a relatively coherent and stable whole due to their mutual interrelationships.” This view of the natural entity idea of a corporation as a system seeks to recognize that a corporation is a thing separate from individuals, but that it is nonetheless the product of humans created to further humans’ interests. Under this natural entity perspective, a corporation is “a collection of people united into a coherent whole by the mutual social relations that shape them.” Because “‘[i]n every case the members are in greater or lesser degree modified by the association into which they enter,’ this system’s attributes cannot be described as the sum of those members’ attributes as they existed before joining.” The pioneering British sociologist Leonard T. Hobhouse used the social structure of a family to illustrate. A family is a separate entity made up of humans and it furthers the interests of humans, but it is more than the sum of its individual members. Hobhouse noted that “[e]very association of men is legitimately regarded as an entity possessing certain characteristics of its own, characteristics which do not belong to the individuals apart from their membership of that association.”

The natural entity theory’s heyday was relatively short, and it had fallen out of favor with courts by the 1920s. The theory’s fall from grace has been portrayed as a backlash against overly abstract theoretical constructs, with a shift instead toward a more concrete analysis of

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173. See Phillips, supra note 142, at 1069 (noting that although some natural entity theorists described corporations as organisms, “[m]any exponents . . . have decidedly less organismist conceptions of the corporation”).


175. Phillips, supra note 142, at 1114.


177. See HOBBHOUSE, supra note 176, at 28 (noting that the human family is an expression of “lives so far as lived in common or in close association with one another” and “as it stands at any given moment is simply the co-ordinated or associated whole of its members as they stand at the same moment”).

178. Id. at 27, quoted in Phillips, supra note 142, at 1113–14.

179. See Phillips, supra note 142, at 1062.
competing rules and their consequences. In other words, the natural or real entity theory was not “real” enough—its metaphysical qualities became viewed as too fanciful and not sufficiently tied to the pragmatic consequences of courts’ rules regarding corporations.

Legal theorists led the attack on corporate theory, maintaining that undue “conceptualism” and abstract legal reasoning in general were muddying rather than solving problems. An influential law review article published by John Dewey in 1926 exemplified this critique with his assertion that each group personality theory “has been used to serve the same ends, and each has been used to serve opposing ends.” However, even if the natural entity theory were accepted as a model for explaining the status of corporations, it accords with the artificial entity theory and the aggregate theory in possessing its ultimate grounding in humanity and in human relationships. Although under the natural entity theory, the corporation is described as “natural” or “real” rather than

180. See John Dewey, The Historic Background of Corporate Legal Personality, 35 Yale L.J. 655, 658–60 (1926). Dewey asserted that the natural entity theory requires inspection and investigation of the internal inherent properties of the entity to determine if it qualifies as a legal “subject” and whether or not the entity possesses the required properties to be held as a right-and-duty-bearing unit. Id. The result, he concluded, is convoluted assertions about necessary preconditions and the great effort required in holding down the seemingly unattainable definition of “subject” that incorporates both a singular man and a conglomerated body or corporation. Id. Dewey pointed out the failings of the natural entity theory and presented a theory that focuses on consequence as a superior replacement. His theory, based on Charles S. Peirce’s pragmatist rule, focuses on:

[N]ot the inner nature of objects but their mutual relations, . . . [thus] the right-and-duty-bearing unit, or subject, signifies whatever has consequences of a specified kind. . . . The consequences must be social in character, and they must be such social consequences as are controlled and modified by being the bearing of rights and obligations, privileges and immunities. Molecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties. Molecules and trees would continue to behave exactly as they do whether or not rights and duties were ascribed to them; their consequences would be what they are anyway. But there are some things, bodies singular and corporate, which clearly act differently, or have different consequences, depending upon whether or not they possess rights and duties, and according to what specific rights they possess and what obligations are placed upon them. If the logical principle be granted, it is a factual matter what bodies have the specifiable consequences and what these consequences are; but it becomes a verbal matter whether we call them all “persons”, or whether we call some of them persons and not others—or whether we abandon the use of the word entirely.

Id. at 661–62; see also Phillips, supra note 142, at 1070 (asserting that for approximately fifty years following the 1920s an “anti-theoretical attitude dominated corporate scholarship in the United States”).

181. See Mayer, supra note 136, at 639 (“The powerful, corrosive critiques of the Legal Realists expedited the demise of corporate theory.”).

182. See Dewey, supra note 180, at 669.
artificial, it is treated as the creation of humans—or at least of human society—and its focus is on facilitating human endeavors.

Just as describing families as real or natural entities rather than as artificial constructs does not diminish the intense humanness of families, theorizing about corporations as possessing a distinctive status does not diminish the humanity of society and of social structures and systems. Animals, in contrast, are not products of human society and are not centered on humanness. As moral agents, humans bear responsibility for treating animals humanely. However, unlike corporations, asserted rights for animals must stand on their own, as animals are neither humans nor human instruments.

4. The Nexus-of-Contracts Theory

The most recently introduced approach to conceptualizing corporations is called the “nexus-of-contracts” theory. The nexus-of-contracts theory generally views a corporation “as a connected group or series of contracts among the firm’s participants.” To serve effectively as a nexus of contracts, generally a corporation must have clear decisionmaking authority through its board of directors, and it must provide credible assurance that it will perform its contractual obligations. This theory began to gain popularity among corporations scholars in the 1980s, “chang[ing] . . . dramatically” the antipathy toward theoretical approaches that had characterized the previous fifty years.

Significantly, the nexus-of-contracts theory has been viewed as a resurrection of the aggregate theory—the idea that corporations are “an association of individuals contracting with each other in organizing the corporation.” Michael J. Phillips notes that “the nexus-of-contracts theory also is an aggregate theory of the firm. Like the aggregate theory, the nexus-of-contracts theory refuses to recognize a meaningful corporate entity distinct from the components that form the corporation.” Further, the theory “asserts that a corporation is a set of contracts and . . .

183. See infra notes 292–93 and accompanying text.
186. Phillips, supra note 142, at 1071.
187. Blumberg, supra note 154, at 293; see also Krannich, supra note 147, at 72.
188. Phillips, supra note 142, at 1071.
those contracts must have parties . . . .”189 Therefore, the theory “obviously is a very individualistic one” focused on each human and business entity—each of which is formed by individual humans—contracting together through the corporation.190 Various proponents of the nexus-of-contracts theory seem to place differing emphasis on various categories of contracting parties—shareholders, managers, employees, creditors, and others—but they tend to view these parties as individuals driven by self-interest, with a particular emphasis on financial self-interest.191 Robert Hessen, an early exponent of the theory, explains that “[t]he term corporation actually means a group of individuals who engage in a particular type of contractual relationship with each other.”192

Thus, as with the other theories underlying the personhood of corporations, the currently popular nexus-of-contracts theory focuses ultimately on the interests of humans. It does so even more directly than does the natural entity theory, which the legal realists unraveled in the early twentieth century.193 These analyses of corporate personhood’s theoretical underpinnings establish that corporate personhood does not in fact support creating animal personhood. Arguing that corporate law sets a precedent for extending personhood to other nonhumans, such as animals, ignores why courts created and maintain corporate personhood. Corporations are legal persons solely because treating them as such benefits humans.194 Rather than establishing an argument in favor of animal rights, corporate personhood and rights instead provide an illustration of how animal rights are different from the rights that courts presently recognize. Divorcing rights from humanity would not be an evolutionary step comparable to extending rights to slaves, women, or human creations such as corporations. It would be instead a misguided repudiation of law’s innate humanness, with all of the blessings and curses inherent in humanity.

B. Rights for Ships Under Admiralty Law

In addition to personhood for corporations, United States admiralty courts’ recognition of a form of personhood in ships may at first glance seem to favor assigning rights to animals. The argument overlaps strongly

189. Id. at 1062.
190. Id. at 1071–72.
191. Id. at 1073. Professor Phillips notes that from this theoretical perspective, human units tend not to be examined as “flesh-and-blood people, but [as] the rational utility maximizers of economic theory.” Id.
193. See supra notes 179–82 and accompanying text.
194. See supra text accompanying note 152.
with analogies drawn to corporations—if rights are recognized for an inanimate thing, should not, even more so, basic rights for an intelligent animate being such as a chimpanzee be recognized?195

Under the admiralty “doctrine of personification,” ships may be treated as a defendant in an in rem civil lawsuit in the United States.196 The doctrine appears to have its roots in English admiralty courts in the 1500s.197 The English courts dropped the doctrine in the 1900s, but it has lived on, uniquely, in American courts.198

As with corporate personhood, limited personhood for ships has a human purpose. The doctrine “aids prospective plaintiffs, as it may be difficult to determine the ownership of the ship and the actual responsible parties.”199 Thus, if a plaintiff cannot determine who owns a ship, the plaintiff may still recover by suing the ship as a “person.” Granting personhood to ships provides what is perceived to be a concrete benefit to humans,200 and if it did not, personhood would doubtless not be granted. Thus, as is the case with corporate personhood, limited legal personhood for ships does not in fact provide support for animal rights.201

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195. See Huss, supra note 35, at 71 (stating that granting personhood status to nonhuman subjects such as “corporations, ships and other entities” supports the “elevation of certain animals to personhood status for particular purposes”). As noted above, some animal rights activists focus on rights for particularly intelligent animals such as chimpanzees, but others cast their net even more broadly, seeking rights for all animals capable of suffering. See supra note 108 and accompanying text.

196. See Huss, supra note 35, at 74; see also Martin Davies, In Defense of Unpopular Virtues: Personification and Ratification, 75 Tul. L. Rev. 337, 338 (2000) (noting the increased criticism from legal academia and judges of the “doctrine of personification of ships[,] . . . which regards a ship as having rights and obligations separate from those of its owner,” and noting that “[c]riticism has tended to focus on cases in which the ship itself is held liable but its owner is not”).

197. See Davies, supra note 196, at 341–43 (noting that the doctrine of personification “can be traced back to the practice of English admiralty courts in the sixteenth century,” and was created, according to the opponents of the doctrine, “as a means to defend and extend the jurisdiction of the High Court of Admiralty . . . [by making the ship] the defendant simply for the purpose of keeping the proceedings out of the reach of the [English] common law’s writ of prohibition”).

198. Id.


200. Not all commentators agree that the doctrine of admiralty personhood provides benefits that make it worth retaining, and the United States is apparently unique in upholding the doctrine. See Davies, supra note 196, at 339–40; Huss, supra note 35, at 74.

201. Other nonhuman entities that have been assigned limited personhood include universities, agencies, and local governmental entities. See Huss, supra note 35, at 74.
IV. CONTRACTUALIST PERSONHOOD: THE CENTRALITY OF HUMANITY TO RIGHTS

No general agreement exists on how rights should be precisely defined. Rights entail complex moral, policy, societal, and cultural considerations, and both philosophers and legal analysts have offered numerous conflicting and competing models seeking to explain or categorize rights.  As addressed above, use of rights language in legal discourse has blossomed since World War II. Many legal thinkers seem smitten with the “romance of rights” in the afterglow of the civil rights movement’s important victories. This romance influences how rights are perceived and enhances the role of emotion in arguments for and against expansion of rights. However, despite differences about what rights are, scholars often agree that personhood is at their core. The United States Constitution addresses “persons” and “citizens” as those subject to its protections. Thus, no matter how it is defined, personhood is a central gateway issue in deciding whether to extend fundamental rights to animals.

The rights status of human embryos provides a helpful illustration of personhood’s centrality—and potential malleability—in assignments of rights. In Davis v. Davis, the Tennessee Supreme Court confronted this issue when divorcing spouses fought over custody of the couple’s frozen embryos. The wife wished to use the embryos for implantation in her own body or for donation to another couple. The husband wished to have the embryos destroyed. Citing a report by the American Fertility Society, the Davis court recognized that three major positions exist regarding the personhood status of embryos. Some ethicists

view embryos as full human persons as soon as they have been fertilized.\textsuperscript{212} Others view embryos as mere human tissue, and thus as a type of property.\textsuperscript{213} The third position balances the other two, holding that an embryo is not an actual person but that it “deserves respect greater than that accorded to human tissue” due to “its potential to become a person” and “its symbolic meaning for many people.”\textsuperscript{214}

\textit{Davis} endorsed the third position—that embryos are not persons with rights—but that they deserve special treatment because of their potential to become persons.\textsuperscript{215} The difficult issues raised by \textit{Davis} about the ethical status of an embryo press the far reaches of personhood. However, the gulf between this issue on the edge of personhood and efforts to assign personhood to animals is enormous. As with personhood for corporations and ships, questions of personhood for embryos relate directly to humans and to humanity. Even under the narrowest possible view of their status, embryos at the very least have the capacity to become human. Animals will never become human and lack even the “symbolic meaning” of potential humanity.

Although embryos may be viewed as holding a status at the edges of personhood, courts have accepted personhood status and at least some fundamental rights for postbirth children, even infant children not yet capable of autonomy.\textsuperscript{216} Again this illustrates the centrality of humanity and human interests in analyses of personhood. Regardless of potential theoretical constructs on what constitutes a person, infants are incontrovertibly human. Assignment of rights to mentally incapable adults also makes sense when humanity is recognized as the focus of courts’ assignment of personhood.\textsuperscript{217} Mentally incapable adults’ lack of autonomy does not make them nonhuman in the eyes of society or of society’s courts, and thus they are assigned personhood and fundamental rights.

\textsuperscript{212} \textit{Davis}, 842 S.W.2d at 596.  
\textsuperscript{213} \textit{Id}.  
\textsuperscript{214} \textit{Id}. at 596, quoted by Ohlin, supra note 206, at 210.  
\textsuperscript{215} \textit{Davis}, 842 S.W.2d at 597.  
\textsuperscript{216} See, e.g., Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist., 873 F.2d 25, 30 (2d Cir. 1989) (holding that the fundamental right of representation is protected by the court and in the event that an infant’s authorized representative is not suitable, “a court may appoint a ‘next friend’ to ensure that the infant’s rights are protected in a court of law”); Bachman v. Mejias, 136 N.E.2d 866, 869 (N.Y. 1956) (holding that the court’s domestic duty of protecting citizens extends to all, and “[t]he individual rights of infants to invoke the protection of the State in which they reside cannot be ignored”).  
\textsuperscript{217} See infra notes 268–79 and accompanying text.
Although philosophers and legal scholars have formulated several theories on the nature of rights, social contract principles—which philosophers often refer to as “contractualism”\(^\text{218}\)—are particularly useful in considering how courts consider rights in the trenches of litigation. Social contract theory also helps explain why humanity and human interests are central to courts’ decisions regarding when to assign rights. Although several variants of social contract theory have been articulated, general reciprocity between rights and responsibilities is a basic tenet.\(^\text{219}\) Under this view, society generally extends rights in exchange for express or implied agreement from its members to submit to social responsibilities.\(^\text{220}\)

Animals cannot submit to societal responsibilities. They lack moral agency and of course cannot be held accountable for their actions. When an animal bites a human or another animal without provocation, we do not have the offending animal arrested and put on trial. We view courts having done so in the Middle Ages with a sense of absurdity or dark humor, perhaps with the feel of a Monty Python sketch.\(^\text{221}\) New Scientist derided assigning rights to animals on this basis:

> If animals have rights which protect them against humans, it is only logical that they should have rights that protect them from each other. If a chimp kills another chimp in the wild, or a human, do we really want to hire a fleet of lawyers? And if we extended honorary personhood to all animals, would the gazelle be entitled to rights against the lion?\(^\text{222}\)

\(^{218}\) Contractualism may be summed up as: “I seek to pursue my interests in a way that I can justify to others who have their own interests to pursue.” This requires “equal moral status of persons . . . [and the] capacity for rational autonomous agency.” Elizabeth Ashford & Tim Mulgan, *Contractualism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2007), http://plato.stanford.edu/entries/contractualism/.

\(^{219}\) See Francione, *supra* note 120, at 247 (describing reciprocity attributes of contractualism); Huss, *supra* note 35, at 61 (“Reciprocity is at the core of contractualism . . . .”).

\(^{220}\) The doctrine may also be described with a focus on responsibilities: Under social contract theory, members of society also surrender some of their liberties in order to enjoy “the order and safety of the organized state.” *Social Contract*, in *THE COLUMBIA ENCYCLOPEDIA* 2640 (Paul Lagasse ed., 6th ed. 2000), available at http://www.bartleby.com/65/so/socialco.html.


> From the later Middle Ages until the eighteenth century, certain peoples in Europe held the anthropomorphic notion that animals could commit crime. Indeed, those animals that were officially suspected of so doing were prosecuted for their misdeeds in secular courts and, if convicted, were subject to a variety of punishments, including public execution.

Because animals cannot be morally blameworthy, they also cannot be in and of themselves morally deserving of rights. However, this does not mean that humans are free to be cruel or negligent toward animals. Rather, the imperative for humans to be humane toward animals derives from humans' moral agency. Unlike its treatment of animals, society treats humans as responsible for their conduct, including their conduct toward animals.

Immanuel Kant was one of the early contractualists to write about the rights status of animals. As a contractualist he did not favor assigning formal rights to animals, arguing that moral duties can only be owed to rational beings that can participate in the social contract. However, Kant emphasized the importance to humanity of treating animals humanely. Although humans must take care to treat animals well, Kant found this obligation to be derived from human responsibilities. He believed that humans “have indirect duties to animals, duties that are not toward them, but in regard to them insofar as our treatment of them can affect our duties to persons.”

If a man shoots his dog because the animal is no longer capable of service, he does not fail in his duty to the dog, for the dog cannot judge, but his act is inhuman and damages in himself that humanity which it is his duty to show towards mankind. If he is not to stifle his human feelings, he must practise kindness towards animals, for he who is cruel to animals becomes hard also in his dealings with men.

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223. Cf. Huss, supra note 35, at 61. Professor Huss asserts that under John Rawls’s view of contractualism, “[a]s animals are not able to participate in the formation of this social contract (because they presumably do not possess a sense of justice and are not rational), there is no moral obligation not to harm them.” Id. My view is that humans do have moral obligations calling for humane treatment of animals but that this is based on human obligations of moral agency rather than on rights ascribed to amoral animals. See infra notes 309–10 and accompanying text.

224. See Huss, supra note 35, at 60–61 (“Immanuel Kant’s ideas can be viewed as providing the historical basis for the modern contractualist’s views on the treatment of animals.”).

225. Id. at 61; see also KANT, supra note 1, at 239 (“So far as animals are concerned, we [humans] have no direct duties. Animals are not self-conscious and are there merely as a means to an end. That end is man.”).


228. KANT, supra note 1, at 240.
The philosopher John Rawls was the most prominent champion of contractualism in recent times. He argued that the moral community includes only those who “are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree.” Animals, he concluded, are not members of the moral community because they lack the “capacity for a sense of justice.” However, like Kant, Rawls’s view that animals are not part of the moral community did not lead him to a disregard for their welfare. He insisted that “it does not follow that there are no requirements at all in regard to [animals]. . . . Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil.”

Evolutionary anthropologist Jonathan Marks elaborates on the importance of focusing on humans in seeking humane treatment, asserting that:

A concern for animal welfare must come out of a concern for human welfare. It must emerge from a concern for human rights, not supplant it. For once we begin to devalue human lives, we lose a standard by which to value any other kind of lives. And it just doesn’t work the other way around.

Marks emphasizes the importance of protecting animals such as nonhuman primates. However, he cautions that humans must guard against allowing concern for animals to come at the expense of concern for human welfare.

In the early twentieth century, jurisprudence scholar Wesley Hohfeld formulated what has become “[p]erhaps the most popular way of speaking about legal rights.” He described legal relations in terms of opposites and correlatives and “believed that the term ‘right’ should be restricted in use to describe those things that correlate to duties. . . . Rights are simple and atomic; rights are claims based on duties.” Courts have utilized the framework formulated by Hohfeld in analyzing legal terms. This formulation recognizes the significance of the social contract in assigning rights: Rights generally have relevance in relation

229. See Huss, supra note 35, at 61 (describing Rawls as “a more contemporary and influential proponent of contractualism” than Kant).
230. JOHN RAWLS, A THEORY OF JUSTICE 505 (1971), quoted in Francione, supra note 120, at 246.
231. RAWLS, supra note 230, at 512, discussed in Francione, supra note 120, at 246.
232. RAWLS, supra note 230, at 512.
233. Id.
234. Id.
235. Id.
236. Id., supra note 203, at 6.
237. Id. at 7.
238. See California v. Farmers Mkts., Inc., 792 F.2d 1400, 1403 (9th Cir. 1986); Kelch, supra note 203, at 6 n.32.
to duties or responsibilities. Philosopher L.W. Sumner recognized the relevance of Hohfeld’s framework in animal rights issues, concluding that under the frequently cited approach, animals cannot have rights because they do not have duties or responsibilities.239

Hohfeld’s formulation of rights might be the most popular because it fits most closely with Western societies’ intuitions and education about rights. Thomas Jefferson borrowed from contractualist John Locke in drafting the Declaration of Independence.240 Locke’s conception of the social contract is that citizens are entitled to “life, liberty and property.”241 Jefferson merely substituted “pursuit of happiness” for “property” in this theme at the core of our national identity.242

School children in the United States are taught social contract theory as a basis for the ideals of the American Revolution. For example, one state articulates a teaching objective for eighth grade social studies students as being to “[a]nalyze the origin of the ideas behind the Revolutionary movement and the movement toward independence; [for example], social contract, natural rights, English traditions.”243

As another of many potential examples, a textbook published by the United States government for use by immigrants who wished to be candidates for citizenship explained that in the book, “[a]n effort is made to use concepts that the immigrant can relate to, such as the social contract and delegation of authority by the people as supported by the Constitution, to help the student understand and appreciate representative government.”244 Social contract ideals of rights mirroring responsibilities were an important intellectual underpinning in the formation of the United States, and our education system appropriately teaches contractualist

239. See L.W. SUMNER, THE MORAL FOUNDATION OF RIGHTS 203 (1987); Kelch, supra note 203, at 8 (“L.W. Sumner, using a Hohfeldian framework, has also concluded that animals cannot have rights since those who are rightholders must be able to comply with normative rules, which excludes animals.”).


241. See id.

242. See id.


244. JOHN G. HERVEY, FEDERAL TEXTBOOK ON CITIZENSHIP. OUR CONSTITUTION AND GOVERNMENT: LESSONS ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES FOR USE IN THE PUBLIC SCHOOLS BY CANDIDATES FOR CITIZENSHIP (1973), http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3a/fd/96.pdf.
themes from the Revolutionary period such as “no taxation without representation” as a foundation of our national identity. The average American likely does not know the philosophical term contractualism, but that same average American has been taught social contract ideals as the very basis of democracy. We are taught from a young age that just as government must give us representation to go along with taxation, it must give us rights that correlate with our societal responsibilities.

Richard Posner has downplayed the practical significance of academic philosophical concepts on the question of animal rights, and although law is connected to abstract philosophy at least at a theoretical level, he has a point. Posner calls Peter Singer—a champion of utilitarianism—one of his “stalking horses” on the issue of rights. Under utilitarianism, behavior that creates the most utility should be encouraged. Posner applies this theoretical philosophy to a hypothetical involving an aggressive dog and a human infant. He asks us to consider a situation in which a dog is about to attack an infant, and we can only stop the dog by inflicting severe pain on it. If the pain we need to inflict on the dog to stop it from harming the infant exceeded the infant’s potential pain from the attack, Posner argues that a utilitarian approach treating animals’ pain as equally important to humans’ pain would require allowing the infant to be attacked. He then notes that “any normal person (and not merely the infant’s parents), including a philosopher when he is not self-consciously engaged in philosophizing, would say that it would be monstrous to spare the dog, even though to do so would minimize the sum of pain in the world.”

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245. Professor Brian Leiter employs humor to defend Posner’s legal pragmatism from critics such as Professor Ronald Dworkin:

Ronald Dworkin describes an approach to how courts should decide cases that he associates with Judge Richard Posner . . . as “a Chicago School of anti-theoretical, no-nonsense jurisprudence.” Since Professor Dworkin takes his own view of adjudication to be diametrically opposed to that of the Chicago School, it might seem fair, then, to describe Dworkin’s own theory as an instance of “pro-theoretical, nonsense jurisprudence.”


247. See LAWRENCE M. HINMAN, ETHICS: A PLURISTIC APPROACH TO MORAL THEORY 163–64 (2d ed. 1998) (“Utilitarianism demands that we consider the impact of the consequences on everyone affected by the action under consideration. . . . Typically, utilitarians claim that we ought to do whatever produces the greatest amount of utility.”).

248. See Posner, supra note 88, at 64.

249. Id.

250. Id.
If the moral irrelevance of humanity is what philosophy teaches, so that we have to choose between philosophy and the intuition that says that membership in the human species is morally relevant, philosophy will have to go . . . . Just as philosophers who have embraced skepticism about the existence of the external world, or hold that science is just a “narrative” with no defensible claim to yield objective truth, do not put their money where their mouth is by refusing to jump out of the way of a truck bearing down on them, so philosophers who embrace weird ethical theories do not act on those theories even when they could do so without being punished. There are exceptions, but we call them insane.251

Similarly, most humans imbued with social contract principles from their earliest education about the nature of rights are unlikely to change their views based on abstract philosophical arguments. Steven Wise acknowledges the difficulty of changing strongly held societal views about the status of animals and argues that change may take place slowly over time—“funeral by funeral”—as people gradually become more enlightened—from his perspective—regarding animals in successive generations.252 However, the significance of social contract principles in the intellectual foundation of the American Revolution is a widely accepted historical fact, and that will not change over time. Its role as the “principal justification” for American independence is “especially familiar.”253 John Locke’s writings “were a primary authority for the

251. Id. at 65. Singer addresses Posner’s critique of philosophy by noting, among other things, that pragmatism is in itself a philosophical position. See Peter Singer, Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner, in ANIMAL RIGHTS, supra note 7, at 78, 80. Singer responds to Posner’s assertion that philosophers have not been prominent in relatively recent changes in moral norms regarding race, homosexuality, nonmarital sex, contraception, and suicide by arguing:

Note how the initial claim that “ethical arguments” did not bring about these changes is suddenly turned into the entirely separate claim that “philosophers” were not prominent in these movements, and then at the end, this becomes a claim about “academic philosopher[s].” But that is not what was to be shown. Can anyone read the judgments of Thurgood Marshall or Earl Warren, or the speeches of Martin Luther King, Jr., and not believe that they were putting forward ethical arguments?

Id. at 85. However, a challenge to academic philosophers’ practical influence does not minimize the importance of ethical arguments to agents of great change such as Martin Luther King, Jr. Although Dr. King was clearly motivated, as are all of us, by views that could be described as philosophy, his level of practical influence would probably have been much different had he presented his position only in an abstract philosophical framework published by an academic press.

252. See Wise, supra note 77, at 72 (quoting economist Paul Samuelson).

Colonists, and his social contract furnished the political theory for both the American Revolution and the framing of the Constitution.\textsuperscript{254}

Thus, when philosophers or political theorists argue that other rights models are superior, they are swimming against a formidable tide in seeking widespread practical application of their views. At least in the United States, so long as children are taught and continue to believe that the ideals that led to the American Revolution are to be cherished, they will likely retain a powerful attraction to social contract principles as a basis for rights throughout their lives. Whether the perception that rights are correlative to responsibilities is an inherent moral instinct or learned or some combination of instinct and learning, a key point is that the perception is widely held. Abstract theory counts in law’s evolution, but it does not count nearly as much as the facts on the ground. As constitutional scholar Geoffrey Stone noted, judges typically build legal theory around results they feel are desirable, and not the other way around.\textsuperscript{255}

\textbf{A. The “Argument from Marginal Cases”: Addressing Rights for Infants and Mentally Incapable Adults Under Contractualism}

As discussed above, some animal rights activists emphasize that rights are assigned to artificial entities, such as corporations and ships, in arguing by analogy that intelligent animals should have rights.\textsuperscript{256} However, analogizing rights assigned to human infants and to mentally incapable adults is even more popular among animal rights proponents; one writer calls it their “central argument.”\textsuperscript{257} This analogizing between infants or mentally incapable adults and intelligent animals in rights debates is sometimes termed “the argument from marginal cases.”\textsuperscript{258} Gary Francione describes the problem as a challenge to those who would rely on contractualism to deny rights to animals:

\begin{footnotesize}
\begin{enumerate}
\item[256.] See supra notes 132–201 and accompanying text.
\item[257.] Elizabeth Anderson, \textit{Animal Rights and the Values of Nonhuman Life}, in \textit{ANIMAL RIGHTS}, supra note 7, at 277, 279.
\item[258.] See Daniel A. Dombrowski, \textit{Babes and Beasts: The Argument from Marginal Cases} 1 (1997); see also Anderson, supra note 257, at 279–80.
\end{enumerate}
\end{footnotesize}
There are many human beings who are not able to exercise or respond to moral claims. Assuming that moral rights and duties are properly viewed as arising from a hypothetical social contract—very significant assumption—there are plenty of humans who lack the capacity to participate in such contractual arrangements . . . but these characteristics are wholly irrelevant to whether a human should be treated as the resource of others.259

The argument is that because infants and mentally incapable adults are not treated as property and are assigned limited rights despite lacking moral agency, it is unfair to treat animals as property on the basis of their lacking moral agency. The argument from marginal cases is at its strongest when the comparison is to particularly intelligent animals, such as chimpanzees and bonobos. Such animals may have significantly more intelligence and communicative ability than infants and many mentally incapable adults, and thus one might argue they are actually closer to moral agency than are some humans.

Although the argument from marginal cases may be attractive on its surface, it is unpersuasive. Although arguments by analogy are important and often appealing, they are also malleable and can be misleading—as demonstrated in the efforts described above to argue by analogy that if nonliving corporations are assigned rights, then a fortiori living and intelligent animals should be assigned rights.260 Analogizing between limited rights for infants and mentally incapable adults and potential limited rights for animals is both problematic and dangerous.

First, the argument from marginal cases fails to account for the complexity of human lives and relationships.261 When deciding how they should treat a human infant, people do not engage in an assessment of its “practical autonomy” to determine whether it is deserving of moral rights and, one hopes, they never will.262 Humans’ motivation to protect human children may be, in part, instinctive.263 To the extent that

259. Francione, supra note 120, at 246.
260. See supra notes 132–201 and accompanying text.
261. See Anderson, supra note 257, at 280 (“[T]he AMC [Argument from Marginal Cases] fails to appreciate the rich complexity of both animal and human lives, and the ways this figures in rights claims.”).
262. For an assessment of arguments that a being’s practical autonomy should determine whether it is assigned rights, see supra notes 111–13.
263. See, e.g., Morten L. Kringelbach et al., A Specific and Rapid Neural Signature for Parental Instinct, PLOS ONE, Feb. 27, 2008, http://www.plosone.org/article/info:doi/10.1371/journal.pone.0001664 (showing that humans are emotionally attracted to babies and that the region in the brain that controls emotion is highly specifically active “within a seventh of a second in response to unfamiliar infant faces but not to adult faces”).

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explanations for such instincts are even necessary, some are not difficult to articulate at a basic level. In addition to sensing infants’ vulnerability and need for protection, humans see hope in them. They are not yet moral agents able to participate in the social contract, but they represent the future of humanity and of the social contract. How they develop will determine what society will become. If they are denied moral rights and treated badly, society will suffer.

This sentiment is demonstrated in how courts generally address family law cases and mandatory education cases. In family law disputes over child custody, for example, courts focus on the best interests of the child rather than the interests of the mother or the father. This is because the child’s development is important to society’s welfare. Depending on how he or she is raised, the child might develop a cure for cancer someday or—at the other extreme—might become a mass murderer. Society has a vested interest in the child’s future. The same may be said of mandatory education. Society recognizes an important interest in having educated adult participants in the social contract, and thus it forcefully asserts itself in requiring that children be educated. This essential connection between human children and society’s future powerfully distinguishes children from intelligent animals that will never become members of the social contract.

One may not make this argument in the same way regarding many mentally incapable adults because many of them will remain mentally incapable their entire lives and will never attain moral agency. Unlike infants, many such adults cannot easily be seen as representing the social contract’s future. However, they do represent its echo. In the practical world—as contrasted with abstract philosophical hypotheses—humans

264. See, e.g., Huckfeldt v. Huckfeldt, 146 N.W.2d 57, 58 (S.D. 1966) (holding that concerning child custody, “[t]he welfare of the children is of paramount consideration and superior to the legal rights and claims of either parent”).


266. See Cupp, supra note 9, at 19 (“An infant, while perhaps not possessing consciousness at one stage of its life, may grow up to become the next Einstein or Gandhi or may develop a cure for cancer.”).

267. See, e.g., Sheehan v. Scott, 520 F.2d 825, 828 (7th Cir. 1975) (“The state has a right to compel school attendance.”); see also Hatch v. Goerke, 502 F.2d 1189, 1192–93 (10th Cir. 1974) (holding Oklahoma’s compulsory education law as constitutional).
recognize a sameness in mentally incapable adults that they will never feel even with intelligent animals. 268 Most people perceive mentally incapable adults as human first, and mental incompetence is seen as an aspect of their humanity rather than as a negation of it. Humans “who are unable, because of some disability, to perform the full moral functions natural to human beings are certainly not for that reason ejected from the moral community.” 269 Gary Francione rejects such reasoning, asserting that “[t]his argument . . . begs the question since the problem is how to distinguish humans from other animals by some characteristic that may be shared by some animals but that is not possessed by all humans.” 270 However, humans and their courts do not evaluate intelligence in deciding whether to assign human dignity rights; they evaluate humanness. 271 All of us know we could become a mentally incapable adult; none of us might become a chimpanzee, and we cannot possibly relate to a chimpanzee on the same level that we can relate to another human.

Further, and thankfully, courts do not have a mechanism for formally determining which mentally incapable adults have absolutely no hope of future participation in the social contract. Many mentally incapable adults, such as those in a temporary coma, will some day regain their mental competence and their moral agency. Additionally, we do not know the future of medicine. Some mental conditions that may presently appear permanent might be cured during our lifetimes. 272 Although the hope of future moral agency for mentally incapable adults is different from the more certain hope of future moral agency for children, it is still hope. Animals, in contrast, will always be animals.

268. See Cupp, supra note 9, at 19 (“Courts assign dignity rights to [a mentally incapable person] because she is a human, and most other humans feel a bond of sameness with her stronger than any bond of sameness they might feel with the most intelligent of animals.”).

269. Carl Cohen, The Case for the Use of Animals in Biomedical Research, 315 NEW ENG. J. MED. 865, 866 (1986), quoted in Francione, supra note 120, at 247.

270. Francione, supra note 120, at 247.

271. As Richard Posner notes, “[i]f the moral irrelevance of humanity is what philosophy teaches, so that we have to choose between philosophy and the intuition that says that membership in the human species is morally relevant, philosophy will have to go,” Posner, supra note 88, at 65.

272. For particularly striking illustrations of adults who suffered long-term paralysis with only occasional ability to move or communicate and then experienced dramatic—if temporary—improvement through drug treatment, see OLIVER SACKS, AWAKENINGS 60–71 (Vintage Books 1999) (1973).
It is also important to note that the line between no moral agency and some moral agency in humans is fuzzy. No clear boundaries exist between people who are minimally intelligent but morally responsible to some degree and people who are nearly but not quite intelligent enough to be morally responsible to any degree.\textsuperscript{273} Thus, seeking to divide humans on the basis of intelligence for purposes of determining whether dignity rights should be assigned would be unworkable. In contrast, courts’ current approach of assigning human dignity rights to all humans because they are human—regardless of their intellectual competence—avoids the confusion and tragic misjudgments that would be inherent in a case-by-case approach.\textsuperscript{274}

Finally, as addressed further in Part V, assigning rights to intelligent animals based on comparisons to mentally incapable adults threatens the weakest and most vulnerable members of human society.\textsuperscript{275} Even the phrase sometimes used to frame the debate—“arguments from marginal cases”\textsuperscript{276}—highlights a challenge to human dignity. No human is marginal. As John Marks notes, “Singling out particular classes of people in order to show how similar they are to apes is a troubling scientific strategy, not least of all when the humans rhetorically invoked are the very ones whose rights are most conspicuously in jeopardy.”\textsuperscript{277} Marks derides blurring the line between humans and apes as “an unscientific rhetorical device” that is “morally problematic (in addition to being zoologically ridiculous).”\textsuperscript{278} Concluding that some animals may be able to “earn” dignity rights if it is established that they are sufficiently intelligent implies that perhaps some humans should lose their dignity rights if they


\textsuperscript{274} Gary Francione challenges concerns about line-drawing. He argues that “[a]lthough there are certainly going to be cases where it is difficult to draw the line, it is also the case that we can distinguish between rational humans and those who are unequivocally non-rational.” Francione, supra note 120, at 247. He adds that “[i]f we had a rule that defined a non-rational human as having an IQ less than twenty and administered that rule fairly, then it would seem that Carruthers would be committed to saying that it would be acceptable to deny moral status to such humans.” Id. I cannot speak for Professor Carruthers, but denying moral status to humans with IQs below twenty would be deeply offensive to my sensibilities and, I suspect, to the sensibilities of most humans. As demonstrated in the analysis provided in this Part, the difficulty in drawing a sharp line between humans with moral agency and humans without moral agency is only one of numerous factors to consider in deciding whether all humans should be assigned dignity rights regardless of their intelligence, and intelligence is not nearly as important as a mentally incapable person’s status as a human being.

\textsuperscript{275} See infra text accompanying notes 299–302.

\textsuperscript{276} See supra note 258 and accompanying text. Daniel Dombrowski notes that the phrase’s name was suggested by Jan Narveson, one of its detractors, and that some find the label objectionable. See Dombrowski, supra note 258, at 1.

\textsuperscript{277} Marks, supra note 121, at 191.

\textsuperscript{278} Id. at 192.
are sufficiently unintelligent. “If [humanity] can be earned, of course, it can also be lost; they are two sides of the same coin.”\textsuperscript{279} If mere cognitive performance were the standard, it is difficult to see why a bright adult chimpanzee would not have more rights than a human infant or a mentally incapable adult. This would seem to be edgy territory even for an academic philosophical theory; it should be given no opportunity for practical application in the real world of courts and law.

V. COSTS OF RIGHTS EXPANSION

All assignments of new rights have costs. As a contractualist perspective on rights recognizes, generally new rights assigned to an individual create new responsibilities for society and for other members of society. Even without formal reference to contractualist principles, the use of “opposites and correlatives” typically used to explain rights concepts recognizes that costs generally go along with the benefits of rights.\textsuperscript{280} Limiting defamation law to protect free speech, for example, has the cost of restricting compensation for some persons who have been seriously harmed by defamatory speech but cannot recover due to speech-protective limitations.\textsuperscript{281} In many cases in which new rights have been assigned, the benefits of expanding or recognizing rights have far outweighed the costs. Almost all would agree that this is the case with slavery. Recognizing a “new” right against slavery was quite worth the cost of depriving slave owners of what had been previously recognized as their property. However, more is not necessarily better in all situations. The societal burdens that come with rights must be considered in addition to their benefits.

When activists casually use rights concepts to address animals’ welfare, they risk ignoring or minimizing societal costs. Among the most dangerous costs of assigning dignity rights to animals is the relaxation of human dignity protections that would likely accompany the change. It is not alarmist to note that inventing new rights for animals would make us view humans as less special and unique. Rather than only seeing animals’

\textsuperscript{279} Id. at 190–91.
\textsuperscript{280} See supra text accompanying note 237.
rights status rise, we should expect also to see humans’ rights status fall, with human rights and animal rights meeting somewhere in the middle.

As noted above, if dignity rights were to be based on the notion of “practical autonomy”—as advocated by some leading animal rights theorists—it is difficult to imagine why an intelligent chimpanzee would not be entitled to greater rights protection than a human infant or a mentally incapable adult. After all, the chimp has greater practical autonomy than these humans. Indeed, one might wonder whether a human infant or an adult with severe mental disabilities would be entitled to dignity rights at all. A comatose human being does not have limited practical autonomy; he or she has virtually no practical autonomy. Thus, such a person may not keep pace with some animals in the competition for rights. Under this approach, if the dignity rights of a chimpanzee conflicted with potential dignity rights for the comatose human, presumably the chimp’s interests would prevail.

Steven Wise seeks to use the example of human infants and mentally incapable adults to further his position that attainment of practical autonomy should be a basis for assigning dignity rights to animals. He asserts that unless we are willing to assign rights to beings without full autonomy, we must come to “a ‘monstrous conclusion’: a great many human beings don’t make the cut.” Wise addresses the partial autonomy problem by arguing that exhibiting “preferences and the ability to act to satisfy them” demonstrates enough practical autonomy to justify assigning some kinds of rights. He believes that many chimpanzees and other intelligent animals possess this level of autonomy. However, although this proposed rights expansion solution seeks to raise the status of many chimpanzees, its potential implications for humans who have little or no practical autonomy are frightening. Wise argues that legal rights for infants “might be explained as resulting from legal fictions or sheer arbitrariness” or that they might relate to infants’ potential for human autonomy, as addressed above. However, he rejects assigning some rights on the basis of potential for future autonomy, asserting that “the potential for autonomy no more justifies treating one as if one had autonomy any more, and probably less, than does one’s potential for

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282. See supra text accompanying notes 259–60.
283. Id.
284. Id.
286. See WISE, supra note 89, at 32. For a more detailed discussion of Wise’s practical autonomy test, see supra notes 111–13 and accompanying text.
287. See supra notes 111–13 and accompanying text.
288. WISE, supra note 89, at 32; see supra notes 256–67 and accompanying text.
Moving Beyond Animal Rights

If practical autonomy is to be an important rights standard, and the potential for future practical autonomy is not seen as enough, one must wonder how secure human infants would be in their rights. Need we be concerned about rights implications for human infants, who at least have a strong probability of attaining practical autonomy eventually? How much more must we worry for human adults with serious mental disabilities that will likely be permanent?

Wise apparently seeks to rescue infants and severely mentally incapable adults by asserting that they may be assigned some level of limited rights despite their disability. However, he insists that “[p]ersonhood and basic liberty rights should be given in proportion to the degree one has practical autonomy.” This seems to further the concern that some humans could be found to have less personhood than some animals. To note an extreme, even something as repulsive as state-sponsored euthanasia for humans with severe mental retardation would be more foreseeable at some point in the future if a lack of practical autonomy for humans made it permissible to rank some animals’ rights more highly than some humans’ rights.

A related but more subtle cost of assigning rights to animals relates to the societal impact of lessening the connection between rights and responsibilities in a manner fundamentally different from all previous extensions of rights. Applying the rhetoric of rights to animals implicitly lessens the significance of moral behavior because animals are not capable of moral behavior. Rights theorists want animals to be seen as more like humans, but the inevitable companion of that result would be to see humans as more like animals. The consequences of courts changing the rhetoric of rights to detach it from humans, human concerns, and moral agency would likely not be felt overnight, but over time the change would almost certainly influence our thinking. Words and concepts matter, and a world with less emphasis on human dignity and moral responsibility would not be better for it.

289. Wise, supra note 89, at 32–33.
290. Id. at 44.
291. Id.
292. As noted above, this concern should not apply in the same way to extensions of rights to infants, mentally incapable adults, or even corporations. See supra notes 256–67 and accompanying text.
One might argue that concern over erosion of status for those already holding rights could also have been used in an earlier era as an excuse to argue against extension of rights to slaves, but that is quite different. Slaves were moral agents and were equally capable of participation in the social contract as were nonslaves. There was never a legitimate basis for enslaving humans; enslaved humans were always equal to free humans, but their equality was simply not recognized. As species incapable of moral responsibility, animals are not equal to humans as capable bearers of rights.

Although lowering the status of human rights may be the most prominent concern with applying a rights paradigm to animals, erosion of economic rights could create the most immediate and widespread societal disruption, particularly if rights were assigned on the “capacity to suffer” approach that many animal rights theorists favor. If, for example, killing all animals capable of suffering for food, clothing, research, or other human use were held suddenly to violate the animals’ rights, our current economy would, of course, collapse. The practical autonomy approach to rights seems to be a grudging concession to this problem and would have less immediate economic impact because it would only assign rights to particularly intelligent animals such as great apes and dolphins, which are typically not killed for food or clothing. However, assigning such rights would be perceived by many as a starting point for eventual broader assignment of rights to animals.

Further, even assigning rights to particularly intelligent animals would inflict costs on scientific research and on the rights of some humans who already find their human rights too seldom respected. John Marks notes that attitudes about rights for animals may be different depending on


294. See supra notes 38–39 and accompanying text.

295. As noted by primatologist Frans de Waal, “[t]his is the reason that the animal rights movement’s outrageous parallel with the abolition of slavery—apart from being insulting—is morally flawed: slaves can and should become full members of society; animals cannot and will not.” Frans B.M. de Waal, Editorial, *We the People (and Other Animals)* . . . , N.Y. Times, Aug. 20, 1999, at A21, available at http://www.emory.edu/LIVING_LINKS/OurInnerApe/pdfs/WePeople.html.

296. See supra note 108 and accompanying text.

297. See Cupp, supra note 9, at 11.

298. See Wise, supra note 77, at 268. Wise argues that when deciding the “best candidates to whom the dignity-rights to bodily integrity and bodily liberty might be extended,” that “[a]rguably the best place [to start] might be those species of animals evolutionarily closest to the three species that are most clearly entitled to fundamental legal rights: chimpanzees, bonobos, and ourselves.” Id. Wise spends three chapters making the case that along with their seeming capability to feel and exhibit self-consciousness, the intelligence and abilities of the chimpanzee and bonobo demand the extension of some basic rights. Id.
one’s wealth and location: “Ape rights is not a political movement in Central Africa or Indonesia, where human rights are sufficiently precarious. The ape rights movement is principally Euro-American.”

He also points out that very poor humans in third world countries are the persons whose economic interests are most powerfully threatened by rights for primates. The economic interests of the average New Yorker or Londoner “do not come into conflict with those of a chimpanzee. The average Tanzanian’s economic interests, on the other hand, may well.”

He continues:

The basic problem is the presumption that comes with a couch-potato argument for rights to Tanzanian chimpanzees, Rwandan gorillas, or Indonesian orangutans. Could you really look a group of Rwandans in the eye, with the horrors and brutalities on massive scales that they have had to endure, and tell them that a gorilla has got the same rights as them? Personally, I couldn’t, but there are people who seem to think they could.

Peter Carruthers concurs, going so far as to regard growing interest in animal rights “as a reflection of moral decadence,” and noting that “many in the West agonise over the fate of seal pups and cormorants while human beings elsewhere starve or are enslaved.”

Regarding scientific research, assignment of rights would inflict significant costs on both humans and animals. Use of animals in scientific research has been instrumental in most major medical advances in the past century. In addition to saving countless human lives, research using animals has also improved animals’ lives through advancements in veterinary medicine. According to a 1997 study by the United States Department of Agriculture, in ninety-two percent of animal research experiments the animal does not experience pain. However, if all

299. MARKS, supra note 121, at 193.
300. Id.
301. Id.
302. CARRUTHERS, supra note 273, at xi.
303. See Nat’l Ass’n for Biomedical Research, The Humane Care and Treatment of Laboratory Animals 1 (1999), http://www.nwabr.org/research/pdfs/NABRHumane.pdf (“Virtually every major medical advance of the last century has depended upon research with animals.”); see also Found. for Biomedical Research, Proud Achievements of Animal Research 12–13 (6th ed. 2006), http://www.fbresearch.org/Portals/9/docs/ProudAchieve.pdf (listing medical advances in which animal research has been vital); New Jersey Association for Biomedical Research, Medical Milestones, http://www.njabr.org/programs/medical_milestones (last visited Feb. 3, 2009) (presenting a timeline of medical advances completed with the use of animal research).
304. See Nat’l Ass’n for Biomedical Research, supra note 303, at 1–3.
305. Id. at 2.
animals capable of suffering were given dignity rights, even experiments that do not involve pain could arguably be halted because the animals are not capable of consenting to the treatment.\textsuperscript{306} Even if only particularly intelligent animals were immediately assigned rights, many rights activists would see this as a mere stepping stone toward a broader assignment of rights to all animals capable of suffering; such a broad assignment of rights would cripple most scientific research involving animals.\textsuperscript{307} Further, even in the short term, assigning rights to particularly intelligent animals would destroy the ability to use many primates—the animals whose bodies are closest to human bodies—in research.\textsuperscript{308}

To briefly note a final illustration of potential costs, assigning rights to research animals would limit scientists’ rights to expressive activity under the First Amendment.\textsuperscript{309} Scientific research may be a form of expression, and although the protection of that right of expression is not absolute, the repression of vitally important expressive activity must be considered when deciding whether to extend rights to animals.

VI. CONCLUSION

Opposing rights for animals should carry with it an especially strong obligation to emphasize the moral and legal significance of humaneness toward animals. Rejecting a rights paradigm for animals does not leave animals defenseless; indeed, accompanied by enhanced sensitivity to the evils of cruelty and neglect, it inures to animals’ ultimate benefit. Focusing on human responsibility may well be an appropriate reason to adopt many of the animal protections sought by rights activists, but the appropriate focus is on humans as responsible moral agents rather than on animals as bearers of rights.

Indeed, a well-intentioned but misguided emphasis on rights diminishes the focus on human responsibility, and de-emphasizing human responsibility ultimately would harm animals. Animals’ welfare as influenced by humans is almost entirely in human hands. Even if we incorporate animal rights

\textsuperscript{306} With estimates of chimpanzees’ reasoning abilities analogized to those of two- or three-year-old children, even intelligent species are not capable of giving consent. See supra notes 127–28 and accompanying text.

\textsuperscript{307} See Cupp, supra note 9, at 30–34.

\textsuperscript{308} See id. at 42–46.

language, humans will decide how humanely animals will be treated. Acceptance of moral responsibility by humans for humaneness toward animals—or humaneness toward humans, for that matter—is in too-short supply. In effect, telling humans through the courts that their moral responsibility is not particularly important in determining whether rights apply would not encourage humans to embrace greater moral responsibility. Rather, it would lessen emphasis on moral responsibility.

Some animal rights activists argue that changing courts’ assignment of property status to animals—in other words, getting courts to assign rights to animals—is imperative for attaining proper protection of animals’ welfare.310 However, developments in recent years increasingly provide contrary evidence.

Despite the failure of animal rights arguments in American courts thus far, public interest in humane treatment of animals has probably never been stronger. Animal welfare issues “are part of the public domain like never before.”311 To illustrate, the Animal Legal Defense Fund asserts that slightly over a decade ago only seven states had felony animal cruelty statutes.312 However, currently forty-one states have adopted felony cruelty statutes, with the three most recent additions—Kentucky, West Virginia, and Wyoming—joining the trend in March 2003.313 Public outcry over the recent Michael Vick animal cruelty case also illustrates this trend. Rather than being overlooked due to his status as a football celebrity, Vick’s mistreatment of dogs caused national outrage and transformed him from a sports idol to a pariah.314 Americans

310. See, e.g., Gary Francione, Reflections on Animals, Property, and the Law and Rain Without Thunder, 70 LAW & CONTEMP. PROBS. 9, 39 (2007) (“[T]he equal consideration of animal interests necessarily requires the recognition that nonhumans have a right not to be treated as the property of humans.”).
313. Id.
314. See, e.g., Michael S. Schmidt, Vick Pleads Guilty in Dog-Fighting Case, N.Y. TIMES, Aug. 27, 2007, http://www.nytimes.com/2007/08/27/sports/football/27nd-vick.html (commenting that Vick’s sullied reputation in his business was made clear when “N.F.L. Commissioner Roger Goodell told Vick in a letter . . . that his actions were ‘cruel and reprehensible’ and that Vick’s involvement in gambling was a violation of the N.F.L.’s personal conduct policy”). In an effort to reconcile, Vick stated the following: “I want to apologize to all the young kids out there for my immature acts . . . . If I’m more disappointed
appropriately focused on anger toward Vick for his failure to properly care for the dogs under his control rather than on rights for the dogs.  

It seems doubtful that the same level of condemnation for this kind of breach of moral responsibility for animal welfare would have been applied to celebrities in earlier generations. Other examples of an increasing recognition of responsibility abound. Several states have enhanced or are in the process of enhancing prohibitions of cockfighting. In 2008, at least thirteen states were considering restrictions on “puppy mills” that breed dogs under inhumane conditions. At least three fast food chains use eggs produced by cage-free hens.

None of these measures to enhance protection of animals from cruelty required an assignment of rights. All of these measures called upon participants in the social contract to exercise reasonable responsibility. Ultimately, acceptance or rejection of moral responsibility by human bearers of rights, rather than an artificial construct of animals as bearers of rights, is what shall determine whether animals—as well as humans—will be treated humanely.

with myself than anything, it’s because of all the young people, young kids that I’ve let down, who look at Michael Vick as a role model.” Jerry Markon & Jonathan Mummolo, Vick Pleads Guilty, Calls Dogfighting a ‘Terrible Thing,’ WASH. POST, Aug. 28, 2007, at A1 (commenting that outside the N.F.L., Vick’s reputation was severely damaged).

315. See, e.g., Take a Bite Out of Vick, with a Dog Chew Toy: Company Selling Plastic Depiction of QB, Who Is Charged with Dogfighting, MSNBC.COM, Aug. 7, 2007, http://nbcsports.msnbc.com/id/20162029/ (noting that “those looking to vent their anger toward Atlanta Falcons quarterback Michael Vick” can purchase a chew toy in the likeness of Michael Vick in his uniform for their dogs); see also D. Orlando Ledbetter & Jeremy Redmon, Cheers, Jeers, Media Circus Surround Vick: Animal Rights Activists, Falcons Fans Turn Out to See Quarterback, ATLANTA J. CONST., July 27, 2007, at A10 (noting that at Vick’s trial, there were angry protests outside the court house. One animal rights activist comments that “[t]he intensity of the crowd and media here really demonstrates that [his conduct] has struck a chord with the American public.”).

316. See Copeland, supra note 311.
317. Id.
318. Id.